No. 93-229

In The
Supreme Court Of The United States
OCTOBER TERM, 1993

LARRY EDWARD DIXON

and

ESTATE of SALLY DIXON, by her personal representative, Johnathon Branch Dixon,

Petitioners,

v.

CSX TRANSPORTATION, INC.
A Virginia Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. CAN A RAILROAD AVOID COVERAGE UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT BY JOINING WITH OTHER RAILROADS IN AN UNINCORPORATED ASSOCIATION FOR THE PURPOSE OF JOINTLY EMPLOYING PERSONS TO DO WORK EXCLUSIVELY FOR THE MEMBER RAILROADS, PARTICULARLY WHEN THE RAILROAD HOLDS A DOMINANT POSITION IN THE MANAGEMENT OF THE ASSOCIATION?

II. WHETHER IT IS PROPER FOR AN APPELLATE COURT TO USE TRIAL TESTIMONY NOT AVAILABLE TO THE DISTRICT COURT AT THE TIME OF ITS DECISION TO CONCLUDE THAT THE DISTRICT COURT ABUSED ITS DISCRETION BY ORDERING A SINGLE TRIAL FOR DAMAGES UNDER THE MUTUALLY EXCLUSIVE REMEDIES OF THE FEDERAL EMPLOYER'S LIABILITY ACT AND COMMON LAW NEGLIGENCE?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

Citation to Opinion Below 2

Jurisdiction 3

Statutory Provision Involved 3

Statement of the Case 4

Reasons for Allowing the Writ . . 22

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER AN IMPORTANT ISSUE OF FEDERAL LAW, WHETHER A RAILROAD CAN AVOID FELA COVERAGE BY JOINING WITH OTHER RAILROADS IN AN UNINCORPORATED ASSOCIATION TO JOINTLY EMPLOY RAILROAD WORKERS. THE FOURTH CIRCUIT ANALYSIS OF THIS ISSUE IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, OF OTHER COURTS OF APPEAL AND STATE COURTS OF LAST RESORT . . 22

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE FOURTH CIRCUIT THAT IT IS AN ABUSE OF DISCRETION NOT TO BIFURCATE THE TRIAL OF A SUIT FOR DAMAGES

UNDER THE MUTUALLY EXCLUSIVE CLAIMS OF FELA AND COMMON LAW NEGLIGENCE 42

Conclusion 65

APPENDIX:

Opinion of the Fourth Circuit . . . . . App. A: 1

Opinion of the District Court Denying Defendant's Motions for Judgment Notwithstanding the Verdict and for a New Trial . . . . . App. B: 1

Order Denying Rehearing App. C: 1

TABLE OF CASES AND AUTHORITIES

CASES: Page

Anderson v. Well-Built Homes of Central Jersey, Inc., 69 N.J. Super. 246, 174 A.2d 216 (1961) . . . 34

Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd., 369 U.S. 355, 360 (1962) 27

Baker v. Texas & Pacific R.R., 359 U.S. 227, 228 (1959) 28

Berger v. Mead, 127 Mich. App. 207, 338 N.W. 2d 919 (1983) 34

Bradsher v. Missouri Pacific R.R., 679 F.2d 1253 (8th Cir. 1982) 31

Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 783 (5th Cir. 1983) 52

Dixon v. CSX Transportation, Inc., 990 F.2d 1440 (4th Cir. 1993) 2

Dugas v. Kansas City Southern Railroad Lines, 473 F.2d 821 (5th Cir.), cert. denied, 414 U.S. 823 (1973) 50

Durham v. Southern Ry. Co., 254 F. Supp. 813, 814-16 (W.D. Va. 1966) . . 47

Fast v. Kahn, 206 Kan. 682, 481 P.2d 957 (1971) 24

Fitzgerald v. United States Lines, Inc., 374 U.S. 16 (1963) 59

Gallick v. Baltimore & Ohio R.R., 372 U.S. 108 (1963) 27

Gonzalez-Marin v. Equitable Life Assurance Society, 845 F.2d 1140, 1145 (1st Cir. 1988) 57

Hartford Accident & Indemnity v. Travelers, 525 S.W.2d 612 (Mo. App. 1975) 34

Hatter v. Lenox, 206 Pa. Super. 263, 212 A.2d 916 (1965) 38

Hebert v. Southern Pacific Transportation Co., 429 U.S. 904 (1976) 31

Hunt v. Regent Development Corp., 3 N.Y.2d 133, 164 N.Y. Supp.2d 694, 143 N.E.2d 892 (1957) 38

Hutchins v. Grace Tabernacle United Pentecostal Church, 804 S.W. 2d 598 (Tex Civ. App. 1991) . . 24

Ikerd v. Lapworth, 435 F.2d 197 (7th Cir. 1970) 47

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) . 23,27,28,29,31,39

Lindsey v. Louisville & Nashville R.R. Co., 775 F. 2d 1322, 1324 (5th Cir. 1985) 24

Miles v. Apex Marine Corp., 494 U.S. 1003 (1990) 62

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) . . . 62

Opper v. United States. 348 U.S. 84, 95 (1954) 53

Pandolfo v. Bank of Benson, 273 F. 48 (9th Cir. 1921) 24

Pelliccioni v. Schuyler Packing Co., 140 N.J. Super. 190, 356 A.2d 4 (1976) 30

Pisicchio v. Salem Transportation Co., 159 A.2d 701, 553 N.Y. Supp. 2d 54 (App. Div. 1990) 37

Reed v. Pennsylvania, 351 U.S. 502 (1956) 27

Robinson v. Baltimore & Ohio R.R., 237 U.S. 84 (1915) 27

Rossanno v. Blue Plate Foods, Inc., 314 F.2d 174, 176 (5th Cir. 1963) 44

Scott v. Public Service Interstate Transportation Co., 6 N.J. Super. 226, 70 A.2d 882 (1950) 35

Seaboard Coast Line R.R. v. Gillis, 294 Ala. 726, 321 So.2d 202 (1975) 32

Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2nd Cir. 1990) 49

Southern Pac. Co. v. Jensen, 244 U.S. 205, 216-18 (1917) 62

Stich v. United States, 730 F.2d 115, 117 (3rd Cir. 1984) 44

United States v. Calabrese, 645 F.2d 1379, 1385 (10th Cir. 1981), cert. denied, 451 U.S. 1018 . . . 44,55

United States v. Socony-Vacuum Oil, Co., 310 U.S. 150, 239 (1940) 56

Vanskike v. ACF Industries, Inc., 665 F.2d 188, 199 (8th Cir. 1981), cert. denied, 455 U.S. 1000 (1982) . 31

Walling v. Western WIB, 160 F.2d 47 (7th Cir. 1946) 25

Ward v. Atlantic Coast Line R.R., 362 U.S. 396, 400 (1960) . . . 28

Wildman v. Lerner Stores Corp., 771 F.2d 605, 609 (1st Cir. 1985) 47, 63

STATUTES AND RULES:

Federal Rules of Civil Procedure:
Rule 8 59
Rule 42 59
Rule 42(b) 7,43,57

28 U.S.C. § 1257(1) 3
28 U.S.C. §§ 1331, 1332 (1988) . 6
45 U.S.C. § 51 3
45 U.S.C. § 56 (1988) 6

OTHER AUTHORITIES

Federal Practice and Procedure,
C. Wright & A. Miller, Vol. 9
(1971 & 1991 Supp.) 58

Moore's Federal Practice, Vol 5,
§ 42.02-.03 (1993) 58

Restatement (Second) of Agency
§ 220 28

Restatement (Second) of Agency
§ 220(2) 29

West's Federal Digests 2nd, 3rd,
and 4th 58

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Larry Dixon and Estate of Sally Dixon, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit

issued in this case on April 13, 1993. The Fourth Circuit denied Petitioners' timely filed Petition for Rehearing and Suggestion for Rehearing In Banc on May 10, 1993. A copy of that order appears in the Appendix to this petition, App. C:1.

CITATION TO OPINION BELOW

The opinion of the Fourth Circuit is reported as Dixon v. CSX Transportation, Inc., 990 F.2d 1440 (4th Cir. 1993). A copy of the opinion appears in the Appendix to this Petition, App. A:1. The memorandum of decision of the District Court denying the Defendant's motions for judgment notwithstanding the verdict and for a new trial is unpublished. A copy of the memorandum of decision appears in the Appendix to this Petition, App. B:1.

JURISDICTION

The opinion of the Fourth Circuit was issued on April 13, 1993. A Petition for Rehearing and Suggestion for Rehearing In Banc was denied on May 10, 1993. This Petition is filed within ninety (90) days of the date of that denial. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(1).

STATUTORY PROVISIONS INVOLVED

At issue in this case is 45 U.S.C. § 51 which provides in pertinent part:

> Every common carrier by railroad while engaged in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the . . . employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars,

> engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

I. Overview of the Trial and Appeal.

Larry Dixon, 47 years old, worked 20 years as a traveling agent for Southern Weighing and Inspection Bureau [SWIB]. On the morning of November 8, 1985, after doing paper work for SWIB at his home in Charlotte, North Carolina, he left in his 1972 Buick on his way to a work assignment in Blacksburg, South Carolina.

Ten miles from home, while crossing tracks with severe obstructions to vision of any oncoming train, his vehicle was hit by a 40 mph CSX train that had failed to sound its whistle until almost reaching the intersection. As a result of the accident, Dixon was left a spastic quadriplegic, with brain damage causing constant seizures, but fully conscious and able to completely understand and appreciate his condition.

SWIB was a nonprofit, unincorporated association formed by railroads (including a number of CSX's corporate predecessors) participating in the Southern Freight Association [SFA] to perform weighing and inspection services exclusively for the member railroads. If Dixon was an employee of CSX at the time of the collision, the Federal Employer's

Liability Act [FELA] provided the sole and exclusive remedy for his claim that CSX's negligence caused his injuries. If he was not an employee of CSX at the time of his injury, a North Carolina common law negligence claim provided his remedy. Uncertain as to the how the employment issue would be resolved, Dixon's suit against CSX asserted a FELA claim and a state law claim as alternative remedies. His wife, Sally Dixon, joined in the state law claim seeking damages for her loss of consortium.[1]

After the case had twice been calendared for trial and past the motion deadline in the District Court's scheduling order, (App. B:179) CSX filed

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[1] The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332 (1988) and 45 U.S.C. § 56 (1988).

a motion under Rule 42(b), Fed. R. Civ. P., to "bifurcate" the trial by trying first the issue of whether Dixon was an employee of CSX within the meaning of FELA and then, depending on the jury's determination of that issue, to try the issues of liability and damages either under FELA or under the state common law. Since most of the evidence at trial would relate to the issues common to both claims of whether the accident was caused by CSX's negligence and/or by Dixon's contributory negligence and of damages, that the minor differences between the two claims could be managed through limiting instructions on any evidence that applied exclusively to one claim and an adequate charge to the jury, the District Court denied the motion. The District Court was concerned that

bifurcating the trial raised serious risks of multiple trials which would waste judicial resources and create a danger of inconsistent verdicts on the common issues of fact (particularly if a jury finding that Dixon was CSX's employee was overturned on appeal). (App. B:67-81).

At the two week trial, almost all of the witnesses gave testimony relating to the issues of negligence, contributory negligence and Dixon's damages which were common to both the FELA claim and the state law claim. In response to CSX's concerns about the differences between the FELA claim and the state law claim, the District Court bifurcated the closing arguments and charge to the jury. After closing arguments by counsel for Larry Dixon and CSX only, the District Court

instructed the jury on the FELA claim alone. The jury returned a special verdict finding that (1) Dixon was an employee of CSX at the time of his injuries; (2) that his injuries were proximately caused by the negligence of CSX (by failing to timely blow the train whistle, by failing to clear known visual obstructions from its right-of-way and by failing to install active warning devices at an extrahazardous crossing); (3) that Dixon was not contributorily negligent; and (4) that the damages necessary to fairly compensate him for his injuries were $13,609,308, composed of $8,609,308 for his "financial needs" (i.e., past and future lost wages and medical expenses) and $5,000,000 for his "mental and physical injuries." Then, following a second set of closing arguments in which

counsel for Sally Dixon participated as well, the District Court instructed the jury on the state law claim alone. The jury returned a special verdict finding that CSX was negligent on the same three grounds, that Dixon was not contributorily negligent, that his damages were $13,609,308, and that Sally Dixon's damages for loss of consortium were $1,500,000.

After denying CSX's post-verdict motions in an extensive written opinion (App. B:1-191), the District Court entered judgment for Larry Dixon on the FELA claim for the damages set by the jury. In anticipation that CSX would continue to maintain on appeal that Dixon was not its employee, the judgment of the District Court provided that, if recovery under FELA was not sustained on appeal,

the Dixons would recover on the common law claim for the damages set by the jury (a position adopted by Judge Wilkinson in his dissent, App. A:79-81).

The very contingency causing the District Court concern came to pass in the appeal. A majority of the three member panel of the Fourth Circuit held that, as a matter of law, Dixon was not an employee of CSX at the time of the accident. (App. A:34). Despite its conclusion that ample evidence supported the jury's findings establishing liability on the state law claim (i.e. that the accident was caused by CSX's negligence and Dixon was not contributorily negligent) (App. A:52-59), the panel majority went on to hold that a new trial <u>in toto</u> on this claim was required because the trial court had

"abused its discretion in refusing to bifurcate the trial." (App. A:21). Judge Wilkinson dissented. Noting the care taken by the trial court to distinguish the FELA and common law claims by bifurcating the closing arguments and jury charge, Judge Wilkinson was of the view that the panel majority had "lost faith in the capacity of juries to resolve civil disputes." (App. A:74,75).

II. Nature of SWIB and CSX's Position in SWIB.

SWIB's daily activities were under the supervision and control of its General Manager (Ernest Royals from 1982 until SWIB was disbanded in 1986). The Manager was under the direct supervision of the Chairman of SWIB's Executive Committee. At the time of the accident,

the position of Chairman was filled by John Paylor, CSX's vice-president and chief traffic officer.

SWIB employees did work only for member railroads. It did not offer its services to the public. SWIB was non-profit. Its expenses were paid from a fund maintained by the association's accounting arm, Southeastern Associated Railroad Bureau [SARB], which billed each railroad for a share of SWIB's costs monthly. Various methods were used the allocate the costs of SWIB's departments. For traveling agents, the time spent for a particular job was allocated to a particular railroad. The hours for all of the traveling agents were totalled, and each railroad was billed on the basis of its percentage of the total hours for all of the traveling agents. Travel

expenses incurred for a job were not allocated to the particular railroad for whom the job was being done. Instead, each railroad was billed for a share of the total travel expenses based on the percentage of total hours allocated to that railroad. For the month in which the accident occurred, CSX was billed for 56.15% of the salaries and expenses of the traveling agents, including those of Larry Dixon. SWIB did not issue paychecks for its employees. They were written by SARB from a SARB account.

Ordinarily, SWIB employees received specific job assignments from SWIB supervisors. Occasionally, SWIB traveling agents received job assignments directly from a member railroad. The railroad employees who comprised the Board adopted rules for the benefit of

each individual member railroads. For example, when at one railroad site, traveling agents were required to maintain confidences about the business of the other member railroads (i.e. when working on the property of Southern Railroad, Dixon could not disclose the business of CSX). In addition to economies of scale from jointly hiring workers through SWIB, a major function of SWIB was to employ uniform practices so that a railroad could trust the weights and measurements taken at another railroad.

On the day of the accident, Dixon started for Blacksburg at the direction of a SWIB manager to install a transit agreement requested by International Paper Co. International had shipped pulpwood from Mississippi to Cherokee

Consolidated warehouse in Blacksburg, South Carolina, for storage and was planning to later ship it to Pennsylvania or Ohio. A transit agreement would allow the shipper the lower rate applying to a shipment direct from Mississippi to Pennsylvania rather than the higher rate for the total of the two shipments. If he had arrived at Blacksburg, Dixon would have installed the transit agreement under Southern RR tariffs, because Southern was the initial carrier to Blacksburg. The rate set by the transit agreement would have applied to CSX and any other railroad that participated in the second leg of the shipment.[2]

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[2] CSX had no track to Blacksburg. CSX did have track in North Carolina and, as a matter of geography, the International Paper pulpwood would have to cross its territory to reach Pennsylvania.

Dixon's time for the day of the accident was allocated to Southern as part SARB's accounting system. Under the allocation system used by SARB, 56.15% of Dixon's travel expenses for the day of the accident were allocated to CSX.

SWIB's Articles of Organization effective August 1, 1968 (17 years prior to the accident), provided for three committees, General, Executive and Administrative, in addition to the Chairman and General Manager. Each member of a committee had one vote. The General Committee was to be composed of one officer from each member railroad, with railroads operating together as a single system under one management considered as a single member. It had the power to review any action of the Executive Committee upon the request.

The Executive Committee was to be composed of the chief traffic officer of ten member railroads. The Executive Committee elected the Chairman by unanimous vote, appointed and fixed the salary of the Manager by unanimous vote, and, by majority vote, acted for SWIB in all matters affecting its common interest, specifically including approving the Manager's appointment of Assistant Managers, fixing the salary of the Assistant Managers and approving any changes made by the Manager which had the effect of increasing SWIB expenses. The Executive Committee was to appoint three of its member to make up the Administrative Committee to handle "administrative and ministerial matters," which included approving the Manager's appointment of subordinate employees such

as Larry Dixon.

Sixty-eight railroads were listed in the 1968 Articles as members of the association. By 1984, as the result of mergers and deregulation in the industry, SWIB's membership had declined dramatically, leading to an alteration of the management structure envisioned in the 1968 Articles. The distinction between the committees was lost. The ten member Executive Committee and three member Administrative Committee collapsed into a single two-man committee made up of CSX's chief traffic officer and his counterpart from Southern Railway. CSX's chief traffic officer also assumed the position of SWIB's Chairman.

During the year preceding the accident, this two-man committee made the broad policy decisions for SWIB,

including approval of the budget and determining the benefits that would be extended to SWIB employees. Much of the discussion in this period related to the termination of SWIB. It was disbanded completely in 1986. After SWIB was terminated, the weighing and inspection functions it had performed were taken over by employees of the individual railroads. Many SWIB employees were hired by an individual railroad. Those who were hired after SWIB was terminated transferred to the railroad's payroll with the accumulated seniority earned during employment by SWIB.

III. Rationale of Fourth Circuit Decision that a Directed Verdict on the Issue of Employment Was Appropriate.

The Fourth Circuit decision allows CSX to avoid liability under the Federal

Employers' Liability Act by finding as a matter of law, a jury could not reasonably find Dixon was an employee of CSX because he was only subject to the direct supervision of SWIB managers, his travel time was allocated to Southern Railroad under the SARB accounting system (although his mileage was not), there was no evidence that CSX could have benefitted from the job assignment, and CSX's dominate position on the SWIB managing boards was subject to the theoretical control of a larger board of railroads.

IV. Rationale of Fourth Circuit Decision that Bifurcation Was Mandatory.

The Fourth Circuit ruled that the district court abused its discretion in denying CSX's pretrial motion to bifurcate the trial. To reach this

conclusion, the Fourth Circuit opinion examined the trial transcript for events that occurred and might not have if the motion had been granted. The opinion concluded that the pretrial ruling was an abuse of discretion (1) because the jury heard at trial Sally Dixon's "loss of consortium" evidence, which the opinion concluded was relevant to the common law claim but not the FELA claim, (2) the jury heard at trial evidence about Larry Dixon's employment, which the opinion concluded was relevant to the FELA claim, but not the common law claim, and (3) the fact that the jury awarded the same damages on both claims was evidence of considerable jury confusion.

REASONS FOR ALLOWING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER AN IMPORTANT ISSUE OF FEDERAL LAW, WHETHER A RAILROAD CAN

AVOID FELA COVERAGE BY JOINING WITH OTHER RAILROADS IN AN UNINCORPORATED ASSOCIATION TO JOINTLY EMPLOY RAILROAD WORKERS. THE FOURTH CIRCUIT ANALYSIS OF THIS ISSUE IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, OF OTHER COURTS OF APPEAL AND STATE COURTS OF LAST RESORT.

A grant of certiorari is warranted to review the opinion of the Fourth Circuit in that it is in conflict with the general body of case law in worker's compensation cases holding that a person employed by an association of businesses or other entities is jointly employed by each of the members, even though control is shared, and is employed by a member of the group even when on an job assignment for another member of the employer group and with the principles enunciated by this Court in Kelley v. Southern Pacific Co., 419 U.S. 318 (1974). The Fourth Circuit held the body of case law dealing

with worker's compensation cases rested on state statutes which had no application to the FELA employment issue (App. A:27, n. 8),[3] in direct conflict with the Fifth Circuit opinion holding that the worker's compensation cases are the source of the common law for the FELA employment issue. Lindsey v. Louisville

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[3] None of the cases making up this body of law refer to a statutory definition of "employed by" or "employee" as a basis for their result. The Fourth Circuit opinion also holds that membership in an unincorporated association does not subject the member to liability for the unlawful acts of the association's employees. This holding is in conflict with the ruling of another court of appeals and state courts of last resort that persons who associate together for some business purpose are each liable for injuries resulting from the wrongful acts of the employees of the association just as if they had entered into a partnership agreement. Pandolfo v. Bank of Benson, 273 F. 48 (9th Cir. 1921); Fast v. Kahn, 206 Kan. 682, 481 P.2d 957 (1971); Hutchins v. Grace Tabernacle United Pentecostal Church, 804 S.W.2d 598 (Tex Civ. App. 1991).

& Nashville, R.R., 775 F.2d 1322, 1324 (5th Cir. 1985) ("The test of employment [for purposes of FELA] is the established test in workers' compensation cases.")

This court has not addressed the question of whether a person employed by an unincorporated association of railroads can be treated as a joint employee of each member railroad for FELA coverage or whether this is a mechanism by which railroads can avoid FELA coverage.[4]

There are many kinds of work

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[4] A claim that inspection bureau employees are jointly employed by the railroads making up its membership is not novel. Inspection bureau employees have been held to be the joint employees of the railroads, and not the employee of the bureau, to exclude them from coverage of the Fair Labor Standards Act. See Walling v. Western Weighing & Inspection Bureau, 160 F.2d 47 (7th Cir. 1946).

necessary to the operation of an interstate railroad in interstate commerce common to all railroads. This ruling encourages railroads to transfer common kinds of jobs from individually employed workers to an association that employs the workers as a means of avoiding the cost of FELA coverage without giving up any significant amount of control over the work.

A. Failure to follow established case law regarding employment issue.

FELA was enacted in 1908 to provide compensation to railroad employees injured in their employment who, under common law, were barred from recovery by the defenses of assumption of the risk and fellow-servant. It applies to any person injured while working in the

employment of a railroad, Reed v. Pennsylvania, 351 U.S. 502 (1956), by the slightest degree of negligence of the railroad. Gallick v. Baltimore & Ohio R.R., 372 U.S. 108 (1963). The right to a jury determination of the ultimate questions of fact is an essential part of the remedy itself, protected by the Seventh Amendment. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 360 (1962).

FELA has no special definition of who is "employed" by a railroad and uses the term in the sense of the common law servant. Robinson v. Baltimore & Ohio R.R., 237 U.S. 84 (1915). Whether the master-servant relationship exists under FELA is a question that, "like that of fault or of causation under the Act, contains factual elements such as to make

it one for the jury under appropriate instructions as to the various relevant factors under law." Baker v. Texas & Pacific R.R., 359 U.S. 227, 228 (1959) (per curiam); Accord, e.g., Ward v. Atlantic Coast Line R.R., 362 U.S. 396, 400 (1960). The "various relevant factors" to be considered by the jury are those identified in Restatement (Second) of Agency §220 (1958) (hereinafter, Restatement), relevant to whether a person is "employed to perform services in the affairs of another . . . subject to the other's control or right of control." Kelley v. Southern Pacific Co., 419 U.S. 318, 324 (1974).

In Kelley, this Court recognized three methods by which a worker, nominally employed by another, could establish he was an employee of a

railroad for FELA: (1) as a borrowed servant of the railroad; (2) as a servant acting for more than one master; or (3) as a subservant of an employer which was in turn a servant of the railroad. 419 U.S. at 324; Restatement (Second) Agency § 220(2) (1958).

The basis of Dixon's claim of employment by CSX rests in either of two categories established by Kelley, that is, he was either a "subservant of a servant" (Dixon was a servant of SWIB who was a servant of CSX) or he was a "servant acting for [multiple] masters (Dixon was a servant acting for all of the railroads). The Fourth Circuit treated SWIB as an independent employer. There is no question that Dixon was a servant of SWIB and, therefore, a subservant of SWIB's master. The issues,

therefore, are whether Dixon was a servant acting for multiple masters, one of which was CSX, or was Dixon a subservant of a company that itself was a servant of CSX.

FELA cases applying the subagent method to wholly owned subsidiary of the railroad make it clear that the subagent method does not require evidence of direct supervision of the worker by a railroad manager at the time of the injury and, instead, is based on the right of the railroad to control the activities of its agent, the subsidiary employing the plaintiff. See, e.g., Pelliccioni v. Schuyler Packing Co., 140 N.J. Super. 190, 356 A.2d 4 (1976) (on remand from Supreme Court for reconsideration in light of Kelley) (employee of railroad although paid and

supervised only by the subsidiary, never supervised by railroad employee and was member of teamsters and not railroad union); Bradsher v. Missouri Pacific R.R., 679 F.2d 1253 (8th Cir. 1982); Vanskike v. ACF Industries, Inc., 665 F.2d 188, 199 (8th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).[5]

FLEA cases arising in the context of

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[5] In Kelley, after finding the borrowed servant method did not apply because railroad employees played no supervisory role in the plaintiff's activities at the time of the injury, the Court remanded the case to the trial court, because there was enough evidence to raise an issue of fact on the subservant theory, even though there was no overlap of supervisory personnel and the subsidiary did some work for other businesses. On remand, the trial judge, sitting without a jury, found that subsidiary was a servant of the railroad and the plaintiff a subservant of the railroad. See Herbert v. Southern Pacific Transportation Co., 429 U.S. 904 (1976) (Blackman, J. dissenting from denial of cert.)

a entity operated jointly by more than one railroad are not numerous.[6] An association of independent entities for the purpose of jointly employing servants is, however, a common form of enterprise, and the issue of the employment status at the time of injury has arisen frequently in worker's compensation cases. These cases hold that a person injured while employed in the service of such an association is employed by each member of the enterprise at the time of the injury.

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[6] In Seaboard Coast Line R.R. v. Gillis, 321 So.2d 202 (Ala. 1975), where the plaintiff was injured while employed and supervised solely by Clinchfield Railroad, a partnership form by Seaboard and L&N RR., the court held that he had a FELA claim against all three railroads because "there is not merely a close relationship between L&N and Seaboard on the one hand and Clinchfield on the other, there is identity. For the purpose of joint and several liability, L&N and Seaboard are Clinchfield." 321 So.2d at 206.

Worker's compensation cases skip over the non-corporate employing association, going directly to the issue of whether a person is a joint employee of all of the members of the association. The issue arises in two contexts: (1) when a person employed in the business of the joint enterprise is injured by the negligence of one member and sues, raising the question of whether suit is barred by the exclusive, limited remedy of worker's compensation; and (2) when the member most directly involved pays the worker's compensation claim and seeks contribution from the another member. The cases hold, universally in the first context and generally in the second, that a person engaged in the service of the joint enterprise is jointly employed by all of the members of the enterprise at

the time of the injury. See, e.g., Berger v. Mead, 127 Mich. App. 207, 338 N.W.2d 919 (1983) (police officer on payroll of one city can't sue officers from another city who shot him during training exercises of a tactical squad made up of officers from a number of cities, because he is the joint employee of all of the police departments while engaged in the activities of the squad).[7]

Workers' compensation cases also deal with the situation in which, at the

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[7] See also, Hartford Accident & Indemnity v. Travelers, 525 S.W.2d 612 (Mo. App. 1975) (company paying worker's compensation to salesman employed by two companies entitled to contribution from the other); Anderson v. Well-Built Homes, Inc., 69 N.J. Super. 246, 174 A.2d 216 (1961) (secretary for three separate businesses who slips while answering telephone is employee of all three businesses)

time of injury, an employee was doing work for one member of the employing association. Such a person is employed at the time of injury by all of the business in the association including a business for whom work was not being done and whose negligence caused the injury. Directly comparable to this case is Scott v. Public Service Interstate Transportation Co., 6 N.J. Super. 226, 70 A.2d 882 (1950).

Scott was employed by two bus companies, Interstate and Coordinated, to do general cleaning work and clean the buses of each company at a garage used by both. The garage was supervised by a superintendent, employed by both companies with his salary split equally. Scott's salary was not split equally. At end of each day, his time was allocated

between the companies based on the number of hours he worked for each. His paycheck was written from a joint account and his wages allocated to the companies based on the time he worked specifically for each. While he was cleaning a Coordinated bus, a bus owned and operated by Interstate, backed into Scott and killed him. His widow sued Interstate for its negligence. The suit was dismissed under the worker's compensation statute, because Scott was employed by Interstate even when he was doing work specifically for Coordinated. The Court held that Scott was <u>at all times</u> under the control of both companies, because their right to control was exercised through the supervision of the jointly employed supervisor. The Court rejected the claim that Scott was not an employee

of Interstate while doing work allocated to and paid for by Coordinated. The fact that his time "may have been charged to one company or the other did not alter the employer-employee relationship of the control by both companies." 70 A.2d at 884.

The result is Scott was dictated by a well established general rule, a person employed by an association of entities remains jointly employed by all members of the enterprise even when doing work that can be ascribed to only one member. In Pisicchio v. Salem Transportation Co., 159 A.2d 701, 553 N.Y. Supp. 2d 54 (App. Div. 1990), a driver for Salem and another trucking company injured while leaving the terminal to drive for the other company was held to be the employee of Salem leaving him with his worker's

comp claim and unable to sue Salem for negligence. In Hatter v. Lenox, 206 Pa. Super. 263, 212 A.2d 916 (1965), a receptionist employed by two doctors with independent practices was injured while at the office before normal hours at the specific request of one doctor. The court held she was the employee of both doctors even when her work at the moment of injury was for only one of them:

> There was very little these two doctors had in common so far as their practice was concerned. Undoubtedly claimant's employment required a sharp separation of duties, each attributable and definable to one particular employer. Whether that duty required arrival before working hours or on a special errand during working hours, it was the claimant's duty to serve them both in the nature of her employment.

212 A.2d at 918. See also Hunt v. Regent Development Corp., 3 N.Y.2d 133, 164 N.Y.

Supp.2d 694, 143 N.E.2d 892 (1957) (watchman employed by two companies a block apart injured on property of one employed by both at the time of the injury).

The jury in this case was instructed on all of the factors described in Restatement as required by Kelley, supra, and asked to decide whether Larry Dixon was employed by CSX at the time of his injury. CSX made no complaint about the adequacy of the instructions. The evidence established a combination of factors, including: Dixon's supervision by SWIB managers running up a chain of command to GM Royals who was under the control or the right to control by the SWIB Chairman, CSX vice-president Paylor, and the SWIB Executive and Administrative Committees, composed of CSX vice-

president Paylor and his counterpart from Southern Railway; CSX's continued membership in the unincorporated association which paid all of SWIB's costs and was the exclusive user of SWIB's services; SWIB's and Dixon's functions devoted solely to work necessary for CSX and the other members to operate under their tariffs; the allocation of 56.15% of all of SWIB's expenses to CSX for the month of the injury; Dixon's injury occurring 10 miles from his home while at the beginning of a trip to Blacksburg to install a transit agreement that would have been applicable to CSX; the allocation of all of Dixon's time on the day of the injury to Southern under SARB's accounting system, because time of a traveling agent was allocated to a particular railroad and, if he had

arrived in Blacksburg, the transit agreement would have been installed under Southern's tariffs; the allocation of 56.15% of Dixon's travel expenses for the day of the injury to CSX, because travel expenses are not allocated directly to the railroad to whom the time is allocated; and the rule requiring SWIB employees not to discussion with one railroad the secrets of another, which would have protected CSX when Dixon was on the property of another railroad like Southern.

For this set of circumstances, the common law definition of master-servant compels a conclusion that Dixon was employed by CSX at the time of his injury. A reasonable jury certainly could, as this one did, find that CSX had a right to control Dixon's and did so

through the SWIB management that CSX had a right to and did control through its vice-president Paylor.

To direct a verdict on this evidence establishes a mechanism for CSX and other railroads to create organizations such as SWIB that will allow total avoidance of any obligation under FELA. To allow this ruling to stand has profound ramifications for all workers currently protected by FELA and runs contrary to the very purposes of FELA.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE FOURTH CIRCUIT THAT IT IS AN ABUSE OF DISCRETION NOT TO BIFURCATE THE TRIAL OF A SUIT FOR DAMAGES UNDER THE MUTUALLY EXCLUSIVE CLAIMS OF FELA AND COMMON LAW NEGLIGENCE.

A grant of certiorari is warranted to review the Fourth Circuit's unprecedented ruling that the trial court abused its discretion in trying together

two jointly pleaded claims arising out of exactly the same accident, which occurred at exactly the same crossing, transpired in the exactly same instant, and involved exactly the same participants and witnesses. Review of the panel's ruling is called for because it clearly meets the governing standards for granting certiorari by this Court. In particular:

> (1) The opinion conflicts with the law of other circuits, by ordering a new liability trial based solely on a hindsight-based second-guessing of the district court's exercise of discretion; and
>
> (2) The panel opinion both overlooks controlling Supreme Court precedent and radically departs from consistent court practice in other circuits, by condemning a district court's joint trial of jointly pleaded claims based on a single occurrence.

A. <u>The misuse of selective hindsight</u>.

The denial of a Rule 42(b) motion is

reversible only for an "abuse of discretion." Since any abuse of discretion logically must occur when the trial judge actually exercises that discretion, see, e.g., Stich v. United States, 730 F.2d 115, 117 (3rd Cir. 1984), appellate inquiry into the soundness of a bifurcation ruling must focus on "[w]hen the ruling was made." Rossanno v. Blue Plate Foods, Inc., 314 F.2d 174, 176 (5th Cir. 1963). Indeed, even in a criminal case, an appellate court "cannot by hindsight find an error on this basis." United States v. Calabrese, 645 F.2d 1379,1385 (10th Cir. 1981), cert. denied, 451 U.S. 1018. The Fourth Circuit decision warrants rehearing because it contravenes these elementary and critical principles of judicial administration.

Consider the position of the District Judge at the time the defendant railroad made its pretrial "bifurcation" motion. In effect, that motion asked for two separate bifurcations. First, the FELA claim was to be disconnected from the common-law claim, so that the two would not be tried together. Then the employment issue raised by the FELA claim was to be bifurcated from the liability and damages issues presented by that same claim and tried first alone. See App. B:70-72. The District Judge recognized that granting the motion thus to trifurcate the action created a certainty of two separate trials that would necessitate repeat performances by a number of witnesses. (App. B:69, 70, 75, 76). More important, he recognized the very real risk of having to hold three

separate trials if the defendant's proposed approach were followed: first, a trial on railroad-employee status under FELA; next, a second full trial on FELA liability and damages if there were a finding of such employment; and finally, if the Court of Appeals later reversed the sure-to-be-hotly-contested finding of FELA employment, a third trial on common-law liability and damages all but exactly duplicative of the second. (App B:70-72). Faced with the prospect of such a burdensome and protracted set of proceedings, The District Judge simply ordered the sort of trial routinely conducted by federal district courts: namely, a joint trial of companion federal-law and state-law claims that

arose out of a single set of facts.[8]

In assessing the appropriateness of

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[8] See, e.g., Ikerd v. Lapworth, 435 F.2d 197 (7th Cir. 1970) ("considerations of judicial economy strongly favor simultaneous resolution of all claims growing out of one event"); Durham v. Southern Ry. Co., 254 F. Supp. 813, 814-16 (W.D. Va. 1966) (refusing to bifurcate FELA claim against two defendants from a North Carolina Wrongful Death Act claim against third defendant, when all claims arise from same accident, despite argument that the "bases of recovery under FELA and the North Carolina Wrongful Death Act are entirely different"; court reasons that there is "little difference between the three causes of action, and "by proper instructions the jury will be able to understand the different considerations" under the different statutes); Wildman v. Lerner Stores Corp., 771 F.2d 605, 609 (1st Cir. 1985) (no abuse of discretion where ADEA and Puerto Rico Anti-Discrimination Statute claims were tried together, "the liability issue was the same under all claims," the "district court carefully and correctly explained the burden of proof applicable to the statutes," separate written interrogatories were submitted for each of the statutes, and instructions to the jury were sufficient for it to cope with and apply correctly the different burdens of proof).

the District Judge's exercise of discretion, it is telling -- and should be dispositive -- that the very contingencies he foresaw as likely to produce three costly trials now have come to pass: the jury in fact found FELA employment, and the Court of Appeals has reversed that finding as a matter of law. No less important, from the outset, an "almost complete overlap" of the evidence, as well as a plethora of additional factors, counseled rejection of the defendant's self-serving proposal of a multi-layered proceeding.[9] Faced

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[9]For example, separate trials risked conflicting approaches to the case by two juries. Any retrial would require an exact duplication of the extensive and expensive expert testimony, as well as a duplicative rehash of virtually all of the documentary evidence. As Mrs. Dixon's intervening death has confirmed, inviting a post-appeal second trial was particularly inadvisable in this case

with the eminent reasonableness of a joint trial in these circumstances, the Fourth Circuit Opinion did not seriously question the District Judge's actual weighing of the relevant factors at the time he ruled on the trifurcation motion. Instead the Opinion weaved together a post hoc condemnation of the District

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because a number of key witnesses were old or sick. Inviting such a retrial also presented a highly wasteful prospect because each separate trial predictably would occupy some two full weeks of court and juror time. The two claims, moreover, involved not only the same facts, but the same basic issues as well -- namely, negligence and contributory negligence. Finally, the District Judge in rejecting the bifurcation motion, could properly consider the defendant's failure to file that motion until after the court's third calendaring of the case for trial and more than a full year after the District Court's motions deadline, (App. B:68). See, e.g., Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2nd Cir. 1990) (relying, inter alia, on delay in making bifurcation motion in finding no abuse of discretion in denial).

Judge's ruling based on various alleged trial errors never even objected to by the defendant.

First, the Opinion reasoned that Mrs. Dixon's so-called "loss of consortium" testimony was "highly prejudicial" to the railroad because a spouse's claim for loss of consortium is not recognized under FELA. The Opinion was incorrect in asserting that this evidence was "irrelevant to Mr. Dixon's FELA claim," (App. A:13), because Mrs. Dixon's testimony as to the couple's "wonderful marriage," "affectionate" bond, and "wonderful sex relationship", (App. A:11, 12), was directly relevant to show Mr. Dixon's loss of enjoyment of life -- an item of damage clearly recoverable under FELA. See App. A:17, citing Dugas v. Kansas City Southern

Railway Lines, 473 F.2d 821 (5th Cir.), cert. denied, 414 U.S. 823 (1973). Even more important, after the Court found the FELA claim unsustainable, the only question it confronted was whether the supposedly erroneous "bifurcation" ruling required a new trial on the state law claim. As Judge Wilkinson cogently observed: "This argument [concerning the loss-of-consortium evidence] cannot support a new trial. Since North Carolina law permits recovery for loss of consortium, any prejudice from the loss of consortium evidence as to the Dixons' common-law claims would have been, by definition, proper." (App. A:72).

Next, the Opinion reasoned that "the joint trial of these distinct actions also resulted in considerable juror confusion, as evidenced by the damages

awards on the alternative verdicts." (App. A:16). The Opinion's reliance on supposed jury confusion about damages is not well-founded and conflicts with the rulings of this Court and of other circuits.[10] Even if it were, however,

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[10] For a detailed explanation why, see App. A:16-19. Most important, the Opinion overlooked the following finding made by the District Judge who -- unlike the panel -- actually saw the jury in action: "The court observed the jury..., and at no time observed any appearance of confusion, bewilderment or any other indication that they did not fully understand and appreciate the nature of the two separate causes of action pursued by plaintiffs. . . . It appears to the court from [the jury's specific inquiry regarding damages] that the jury were aware of the differences in calculation of damages under FELA and under common law negligence." (App. B:183). Particularly in light of this finding, the reliance on supposed "juror confusion" was directly contrary to governing law. See Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 783 (5th Cir. 1983) ("We cannot condemn the verdict as defective on its face because the awards were identical, even though the elements of damages sought by the

"the most this argument proves is the need to remand for retrial on damages alone. In no way does it justify the more drastic remedy of a whole new trial." App. A:81 (Wilkinson, J., dissenting).

It follows that the only possible ground for ordering a new liability trial based on the failure to trifurcate lies in the assertion that the evidence of Mr. Dixon's status as a railroad employee under FELA was "highly prejudicial" with

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respective plaintiffs differed"; and relying in particular on the fact that the "trial court was 'satisfied that there was no mistake as to the jury's intention'"). See generally Opper v. United States, 348 U.S. 84, 95 (1954) ("To say that the jury might have been confused [when severance was not granted] amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the Court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions.").

respect to the jury's ruling on the common-law claim. To state this assertion is to refute it. Indeed, it is hard to conceive of evidence more technical, arcane and innocuous than the evidence offered to show that Mr. Dixon was a CSX employee under the "subservant" and "multiple master" theories.

Given this fact, it is not surprising that the panel majority does not really rely at all on the existence of "prejudicial" evidence regarding Mr. Dixon's employment. Instead the panel majority reasons that Judge McMillan's abuse of discretion in failing to conduct multiple trials is revealed by plaintiff's counsel's brief reference in the FELA closing argument to CSX's being "a 'ruthless' employer more concerned with 'the bottom line' than with the

well-being of its employees." App. A:15. This remark could not have been anticipated by the district court and thus cannot be used to show abuse of discretion in earlier deciding not to trifurcate the trial. See United States v. Calabrese, 645 F.2d 1379, 1385 (10th Cir. 1981), cert. denied, 451 U.S. 1018 (1981) (rejecting "a rule requiring separate trials whenever the unexpected conduct of one attorney or defendant might prejudice another" because such a rule would "preclude the use of joint trials altogether"). In any event, as Judge Wilkinson observed in his dissent: "I have difficulty believing that some closing remarks, to which CSX did not object at trial, could seriously have

affected the jury's verdict." App. A:73.[11]

In short, the Fourth Circuit majority's hindsight-driven "bifurcation" ruling ignores controlling law. In particular, it cannot stand because the "rationale . . . that the joint trial caused 'considerable juror confusion'" rests on nothing more than "bald contention" and "conjecture." App. A:74.

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[11] Defense counsel never contemporaneously objected to the allegedly improper closing argument of plaintiffs' counsel, never requested a mistrial based on that argument, never relied on the closing argument in its motion for new trial, and never presented a closing-argument claim of error to the trial court at any time or in any way whatsoever. In these circumstances it cannot be said that denial of the separate trial motion caused any unfair prejudice to the defendant since any possible prejudice was brought on by the defense's own failure to seek protective or corrective action. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239 (1940).

(Wilkinson, J., dissenting).

B. Universal Practice and Supreme Court Precedent.

It is important to recognize the genuinely extraordinary nature of what the Fourth Circuit majority has done in this case. It has declared that the district court "abused its discretion" in jointly trying two claims, properly pleaded together in the same complaint, that arose out of the very same occurrence. After extensive research, plaintiffs' counsel have concluded that never, in the 54 years since adoption of the Federal Rules of Civil Procedure, has any reported decision from any circuit court ever held that any district court abused its discretion in failing to bifurcate under F.R.C.P. Rule 42(b). Accord, Gonzalez-Marin v. Equitable Life

Assurance Society, 845 F.2d 1140, 1145 (1st Cir. 1988) ("Although Equitable urges us to find such an abuse [of discretion in the trial court's denial of a motion to bifurcate] in the instant case, it fails to cite a single case in which an appellate court has reversed a decision for failure to bifurcate and we also have been unable to find any." Emphasis added.).[12] Most important for present purposes, no such abuse has been found based on any failure to bifurcate two claims joined in a single complaint based on a single occurrence.

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[12]Counsel for plaintiffs in the case at bar believe the First Circuit's finding to be still valid, after thoroughly searching West's Federal Digests, 2nd, 3rd and 4th, C. Wright & A. Miller, Federal Practice and Procedure, Vol. 9, §§2381-92, (1971 & 1991 Supp.), and Moore's Federal Practice, Vol. 5, ¶s 42.02-.03 (1993).

The reasons for the appellate courts' universal practice are not complex. Rule 8 clearly envisions the joint prosecution of claims. See Fed. R. Civ. P. Rule 8. Rule 42 affords to district courts discretion that is "extensive." And common sense counsels that, if it ever makes sense to try claims together, it is when they arise from precisely the same event. The critical point is that the decision of the panel majority not only is unusual; it is unprecedented.

The Fourth Circuit Opinion also contravenes this Court's decision in Fitzgerald v. United States Lines, Inc., 374 U.S. 16 (1963). In Fitzgerald, an injured seaman's administrator had sought to join for trial before a single jury a claim of negligence under the Jones Act

and another claim under admiralty law for maintenance and cure. The district court had bifurcated the proceeding because the separate claims involved "slightly different principles and procedures," and because "damages are measured by different standards." Id. at 18. This Court ruled that the district court had erred as a matter of law in not conducting a single trial on both claims before the same jury. The Court reasoned that the incompatible damages standards favored the resolution of all damages issues by a single factfinder to negate the risk of conflicting approaches. More fundamentally, however, the Court mandated a joint trial because the two claims "are based on one unitary set of circumstances, serve the same purpose of indemnifying a seamen for damages caused

by injury, depend in large part upon the same evidence, and involve some identical elements of recovery." Id. at 18. This Court put its holding in blunt terms that directly control this case: "Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." Id. at 21.

C. Future Dangers.

Finally, the Fourth Circuit Opinion warrants rehearing because it endangers the cause of just and sound judicial administration. At the least, the ruling will routinely result in multiple trials in cases, like this one, involving

mutually exclusive alternative claims.[13] More important, the principle applied by the panel majority to decide this case mandates multi-stage trials in innumerable additional cases heretofore routinely handled by way of the ordinary, single unitary proceeding. This is so because, as Judge Wilkinson observed, the

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[13]It bears emphasis, in this regard, that there are important bodies of federal law, in addition to FELA, that exclude resort to jointly pleaded state claims based upon some initial factual "status" determination like the railroad-employee determination necessitated by this case. See, e.g., Miles v. Apex Marine Corp., 494 U.S. 1003 (1990) ("The Jones Act preempts state law remedies for the death or injury of a seaman"); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) (holding that Death on the High Seas Act, if applicable, provides an exclusive remedy, thus displacing wrongful death remedies under state law); Southern Pac. Co. v. Jensen, 244 U.S. 205, 216-18 (1917) (holding that if plaintiff's work was "maritime in nature" general admiralty law provided remedy exclusive of state personal injury law).

risk of prejudice to the parties through the joint trial of two claims in a single-event train-crash case is infinitely less than the risk of prejudice when a jury, for example, confronts a multi-act, multi-issue, multi-claim antitrust or securities case. App. A:74. Accord, e.g., Wildman v. Lerner Stores Corp., 771 F.2d 605, 609 (1st Cir. 1985).

We live in a time of unprecedented concern about the overcrowding of court dockets, and eroding public confidence in the judiciary due to the delays, costs and complexities of even ordinary litigation. In this case, the District Judge responded to these concerns in a way that would be expected of any reasonable district court judge: by declining to split into three parts a

single action against a single defendant based on a single crossing accident that transpired in a single split-second. In his dissent Judge Wilkinson captured well why the trial court's ruling was sound and why the ruling of the panel majority is fraught with danger:

> Civil plaintiffs assert alternative theories of recovery all the time. Next to the issues posed in a large antitrust or commercial contract dispute, the issues in this case pale in their complexity and scope: How fast did Mr. Dixon approach the crossing? Did he stop first to look for an oncoming train? How clear was his view down the tracks? Did he have enough time to spot the oncoming train and get out of the way? These are just the sorts of determinations for which juries are best suited. In this case, moreover, the District Court took particular care to keep the FELA and state law standards distinct, by bifurcating the charges to the jury, and by allowing the litigants to make separate

> closing arguments about each claim. Unless we have lost faith in the capacity of juries to resolve civil disputes, the assertion that the joint trial somehow confused the jury must fail.

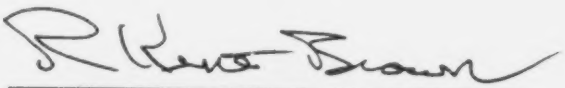
App. A:74,75 (emphasis added).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that this Court grant their petition and issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

This the 5th day of August, 1993.

Respectfully submitted,



R. Kent Brown
ATTORNEY FOR PETITIONER

Filing and Mailing Certificate

I do hereby certify that I have this 9th day of August, 1993 filed 40 copies of the foregoing Petition for Writ of Certiorari with the Clerk's Office of the Supreme Court of the United States and have mailed the required three (3) copies to opposing counsel.

The necessary filing and mailing was performed in accordance with instructions by counsel on the case.

Barbara E. Grove

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No. 93-

Supreme Court, U.S.
FILED
AUG 9 1993

In The
Supreme Court Of The United States
OCTOBER TERM, 1993

LARRY EDWARD DIXON

and

ESTATE of SALLY DIXON, by her personal representative, Johnathon Branch Dixon,

Petitioners,

v.

CSX TRANSPORTATION, INC.
A Virginia Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

APPENDIX A
Opinion of the Fourth Circuit . . . . . App. A 1

APPENDIX B
Opinion of the District Court Denying Defendant's Motions for Judgment Notwithstanding the Verdict and for a New Trial . . . App. B 1

APPENDIX C
Order Denying Rehearing . App. C 1

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LARRY EDWARD DIXON; ESTATE OF SALLY H. DIXON, by her personal representative JOHNATHAN BRANCH DIXON, Plaintiffs-Appellees, v. CSX TRANSPORTATION, INCORPORATED, a Virginia corporation, Defendant-Appellant, and SEABOARD SYSTEM RAILROAD, a Virginia corporation; SEABOARD SYSTEMS RAILROAD, INC., a Virginia corporation, Defendants.	No.92-1652

Appeal from the United States
District Court
for the Western District of North
Carolina, at Charlotte.
James B. McMillan, Senior District
Judge.
(CA-88-533-C-C-M)

Argued: October 28, 1992

Decided: April 13, 1993

Before RUSSELL, WILKINSON, and LUTTIG,
Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Luttig wrote the opinion, in which Judge Russell joined. Judge Wilkinson wrote a dissenting opinion.

COUNSEL

ARGUED: Thomas Ashe Lockhart, CANSLER, LOCKHART & EVANS, P.A., Charlotte, North Carolina, for Appellant, Roger Kent Brown, BROWN, HOGIN & MONTGOMERY, Charlotte, North Carolina, for Appellees. **ON BRIEF:** Thomas D. Garlitz, CANSLER, LOCKHART & EVANS, P.A., Charlotte, North Carolina, for Appellant. James R. Glover, GLOVER & PETERSEN, P.A., Chapel Hill, North Carolina, for Appellee Larry Dixon; Charles McB. Sasser, COX, GAGE & SASSER, Charlotte, North Carolina, for Appellee Sally Dixon.

OPINION

LUTTIG, Circuit Judge:

CSX Transportation, Inc., appeals from alternative judgments rendered in favor of Larry and Sally Dixon totalling $13,609,308 on a Federal Employers' Liability Act (FELA) claim and $15,109,308 on two state law claims. All three claims arose from a 1985 accident in which a train operated by CSX struck Mr. Dixon's automobile. For the reasons that follow, we vacate both judgments, dismiss the FELA claim, and remand for a new trial on the Dixons' state law claims.

I.

Appellee Larry Dixon was a traveling agent employed by the Southern Weighing and Inspection Bureau ("SWIB"), an unincorporated association of railroads

including appellant CSX Transportation.[1] On November 8, 1985, Dixon was driving west along North Carolina Highway 27 in Mecklenburg County, North Carolina, *en route* to Blacksburg, South Carolina, on business. Dixon made a left turn onto Rhyne Road and proceeded south toward the point at which the CSX train tracks cross Rhyne Road, fifty-eight feet from the intersection with Highway 27. At the crossing, a three-to four-foot high bank covered with weeds ran along the northern edge of the CSX railroad bed to the east of Rhyne Road.

Ralph Cox, the only independent eyewitness to the accident, was driving north along Rhyne Road toward Dixon and

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[1]CSX Transportation, Inc., formerly Seaboard System Railroad, changed its name in 1986.

the CSX crossing as Dixon approached from the north. Cox testified that he first heard the whistle of the CSX train as it emerged from behind a treeline approximately 200 feet east of the crossing. At about this time, Cox looked straight ahead and saw Dixon, whom he had previously observed moving slowly toward the CSX crossing, "within a few feet of the railroad tracks." J.A. at 213. According to Cox, Dixon had been looking to his left toward the oncoming train and then had turned forward with a startled expression on his face. Apparently realizing that he did not have time to stop and back up, Dixon tried to clear the crossing in front of the lead engine, but the CSX train struck the left rear quarter panel of Dixon's automobile. The accident left Mr. Dixon a permanently

brain damaged quadriplegic.

Dixon brought a personal injury suit against CSX, claiming that he was entitled to recovery, alternatively, under FELA if it were determined that he was employed by CSX at the time of the accident, or otherwise under North Carolina law.[2] Dixon's wife sought recovery for loss of consortium under North Carolina law.[3] CSX moved to

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[2]FELA affords covered plaintiffs the exclusive remedy for personal injury claims. *New York C. & H.R.R.R. v. Tonsellito*, 244 U.S. 360, 361-62 (1917); *Anderson v. Burlington Northern, Inc.*, 469 F.2d 288, 290 (10th Cir. 1972). Dixon, therefore, cannot recover under both FELA and North Carolina law.

[3]Upon Sally Dixon's death shortly after the conclusion of the trial, we granted her estate's motion to substitute its personal representative, Johnathan B. Dixon. *Dixon v. CSX Transp., Inc.*, No. 92-1652 (4th Cir. Oct. 20, 1992). In the interest of clarity, we refer herein to the loss of consortium claim as Mrs.

bifurcate the trial on the FELA and state law claims. The district court denied the motion and allowed the Dixons to pursue both actions in the same proceeding.

At the close of the case, the district court first instructed the jury to decide Mr. Dixon's FELA claim. As to this claim, the jury answered a special verdict in Dixon's favor, finding that: (1) Dixon, in addition to being an employee of SWIB, was also employed by CSX at the time of the accident and was therefore covered by FELA; (2) CSX's negligent failures to blow the train whistle in a timely fashion, to clear known obstructions from its right of way,

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Dixon's. This claim is not actionable under FELA. *Kelsaw v. Union Pac. R.R.*, 686 F.2d 819, 820-21 (9th Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983).

and to install active warning devices at the "extrahazardous" Rhyne Road crossing, were collectively a proximate cause of Dixon's injuries; (3) Dixon was not contributorily negligent; and (4) Dixon was damaged in the amount of $13,609,308 - $8,609,308 for his "Financial Needs" and $5,000,000 for his pain and suffering. Notwithstanding the exclusiveness of the FELA remedy, and over CSX's objections, the district court then instructed the jury on the Dixons' state law claims. As to these claims, the jury again found that CSX had been negligent on the three grounds recited above, that Dixon was not contributorily negligent, and that he was damaged in the amount of $13,609,308. The jury awarded Mrs. Dixon $1,500,000 on her loss of consortium claim.

The district court thereafter entered judgment on the FELA verdict and ordered that if the judgment were overturned on appeal, the Dixons could nonetheless recover on the state law verdicts that had been rendered in their favor. CSX brought this appeal, challenging the district court's denial of CSX's motions to bifurcate the trial and for judgment notwithstanding the verdict (JNOV), and its admission of testimony from two of Dixon's expert witnesses. We address these challenges in turn.

II.

CSX moved to bifurcate the trial pursuant to Fed. R. Civ. P. 42(b) so that the jury would determine in the first proceeding whether, at the time of the accident, Mr. Dixon was employed by CSX

within the meaning of FELA and, depending upon its resolution of this question, would determine in the second proceeding whether CSX was liable to Dixon on either his FELA or state law claims. The district court denied the motion without comment. J.A. at 62-63.

CSX argues that the district court abused its discretion in refusing to bifurcate the trial. Although trial courts must be given wide latitude in managing the litigation before them, we agree that under the particular circumstances of this case, it was an abuse of discretion to deny the motion to bifurcate. As a consequence of the simultaneous trial of the FELA claim and the North Carolina causes of action, the jury heard inflammatory evidence on Mrs. Dixon's loss of consortium that, although

relevant to the Dixons' state law claims, was irrelevant to the FELA claim, and it heard incitive evidence relevant to the FELA claim that was irrelevant to the Dixons' state law actions. The inevitable effect of the introduction of this highly prejudicial evidence was to deny CSX the fair trial to which it was entitled on both the Dixons' federal and state claims.

With respect to the loss of consortium claim, the jury heard emotional testimony from Mrs. Dixon that she had had a "wonderful marriage" with Mr. Dixon; that her husband had always been affectionate and considerate toward her; that the two had had a "wonderful sex relationship"; but that their relationship had been unalterably affected for the worse as a result of the

accident. *Id.* at 785-87, 791-92, 807. This testimony was so powerful that, according to CSX, *see* Appellant's Br. at 45, several jurors openly wept during its presentation. Additionally, the Dixons introduced birthday and anniversary cards that they had exchanged over the years as evidence of the quality of the relationship that they had enjoyed prior to the accident. J.A. at 805-07, 1138-61.

The jury also viewed the videotaped deposition of Dr. Kirkwood Schultz, who testified that the accident had plunged Mrs. Dixon into a severe suicidal depression and forced her to work "when her feet were rotting off and pus was running out of her feet" and otherwise to jeopardize her health in order to keep the family together. *Id.* at 698-99. All

of this evidence, of course, was admissible on the issue of Mrs. Dixon's damages, and perhaps even on the issue of Mr. Dixon's damages, under state law. Because loss of consortium is not actionable under FELA, however, *see supra* note 3, this highly prejudicial evidence was irrelevant to Mr. Dixon's FELA claim. See *Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin,* 283 U.S. 520, 521 (1931) ("In actions under [FELA] no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice."); *see also Chicago, St. P., M. & O. R. Co. v. Arnold,* 160 F.2d 1002, 1008 (8th Cir. 1947); *Southern Pac. Co. v. Ralston,* 67 F.2d 958, 959-60 (10th Cir. 1933).

With respect to Mr. Dixon's FELA claim, the jury heard extensive testimony

on the question of whether Mr. Dixon was employed by CSX. Two former SWIB employees testified that they considered themselves CSX employees and Mrs. Dixon and her son testified that they believed Mr. Dixon worked for the railroad. J.A. at 536-37, 559-60, 579-81, 770-71, 783-84. There was also testimony from the former general manager of SWIB that Mr. Dixon was covered under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, *id.* at 519-21, 525-26, statutes that differ significantly from FELA in that they expressly cover weighing and inspection bureau employees, *see* 45 U.S.C. §§231(a)(1)(i), (iv); 351(a), (b). Appellees presumably intended for the jury to infer from this testimony that Dixon was, or at least thought he was, a

railroad employee for purposes of FELA.

This testimony regarding Mr. Dixon's employment served as the foundation for Dixon's closing argument in which counsel characterized CSX as a "ruthless" employer more concerned with "the bottom line" than with the well-being of its employees. J.A. at 964; an employer that "no longer want[ed] to have to contribute to [its] responsibilities to the employees [it] formerly had [*i.e.*, Mr. Dixon]," *id.* at 941; and an employer that had bullied employees, threatening them with termination if they did not testify in the railroad's favor at Mr. Dixon's trial. *Id.* at 963-64.[4] While all of

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[4]CSX argues that the closing argument delivered by Dixon's counsel in itself constituted reversible error because it was inflammatory and "out of bounds," *see Werner v. Upjohn Co.*, 628 F.2d 848, 854 (4th Cir. 1980), *cert.*

this testimony was relevant to an issue that was indisputably central to Dixon's FELA claim, it was wholly irrelevant to the Dixons' state law claims and undoubtedly prejudicial to CSX, especially given the way in which it was drawn together by counsel in closing argument.

The joint trial of these distinct actions also resulted in considerable juror confusion, as evidenced by the damages awards on the alternative verdicts. The jury was instructed with respect to Mr. Dixon's FELA claim: (1)

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denied, 449 U.S. 1080 (1981). Because of our disposition of this appeal, we need not reach this contention. We note, however, that had the district court bifurcated the trial and correctly resolved the FELA employment issue, the permissibility of counsel's closing argument presumably would not have been drawn into question. *See infra* Part III.A.

that it should reduce any damages awarded for lost wages or injury to earning capacity to reflect anticipated income taxes, *see Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980); (2) that it should award damages for loss of enjoyment of life as part of any compensation for pain and suffering, *see Dugas v. Kansas City Southern Ry.* 473 F.2d 821, 827 (5th Cir.), *cert. denied*, 414 U.S. 823 (1973); and (3) that any awards of future lost wages and medical expenses had to be reduced to present value, *see Aldridge v. Baltimore & O.R.R.*, 866 F.2d 111 (4th Cir. 1989) (*en banc*). Immediately following return of its verdict on the FELA claim, the jury was instructed with respect to the Dixons' state law claims: (1) that it should *not* deduct income taxes from any award of damages for lost

wages or injury to Mr. Dixon's earning capacity, *see Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843, *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982); (2) that it could *not* award damages for the loss of enjoyment of life, because such recovery is not authorized by North Carolina law; and (3) that it should reduce to present value *all* future damages, including those for pain and suffering, *see Shipp v. United Stage Lines, Inc.*, 192 N.C. 475, 135 S.E. 339, 341 (1926). Although these significantly different methods for calculating damages would almost inescapably result in different damage awards, the jury awarded Mr. Dixon precisely the same amount ($13,609,308)

on his North Carolina and FELA claims.[5] It is evident from the identical verdicts that the jury was unable to distinguish between the FELA and the state law claims, at least insofar as the measures of damages were concerned.

The district court undoubtedly believed that the simultaneous trial of these two alternative causes of action would conserve judicial resources and save all parties and witnesses time and expense. Whether or not these laudable

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[5]As part of a general challenge to the size of the compensatory awards to the Dixons, CSX contends that the two verdicts are necessarily inconsistent and that, as a consequence, neither judgment can stand. *See* Appellant's Br. at 42-43. We do not reach this argument as an independent ground for reversal; we again note, however, that this potential problem would not have arisen had the trial been bifurcated. We also express no view on CSX's separate contention that the awards were excessive.

goals were served by the single proceeding, "a trial must remain fair to both parties, and such considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice." *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (*en banc*), *cert. denied*, 464 U.S. 1040 (1984). In the circumstances of this case, we are left with the firm conviction that, because the district court tried the federal and state claims together, thereby exposing the jury to the inflammatory and irrelevant evidence on the respective claims recited above, CSX did not receive a fair trial on either the FELA or the state law claims. *See generally Cazad v. Chesapeake & O. Ry.*, 622 F.2d 72, 75 & n.3 (4th Cir. 1980)

(noting "marked difference in the basis for liability" under FELA versus state common law and recognizing that "the complexities incident to these divergent theories of liability" may warrant denying FELA defendant leave to implead third parties under a state law claim); *Cavanaugh v. Western Md. Ry.*, 729 F.2d 289, 294-95 (4th Cir.) (instructing district court on remand to try FELA claim and state law counterclaim separately), *cert. denied*, 469 U.S. 872 (1984). Because we conclude that the denial of CSX's severance motion constituted an abuse of discretion, we vacate the alternative judgments entered by the district court on the jury's verdicts in the Dixons' favor.

III.

CSX urges that a remand is unnecessary because it is entitled to judgment on both Mr. Dixon's FELA claim and the Dixons' state law claims. It contends that the district court erred in failing to grant its motions for JNOV (1) on the FELA claim because Mr. Dixon was not employed by the railroad as a matter of law, and (2) on the state law claims because Mr. Dixon was contributorily negligent as a matter of law, barring both his claim and his wife's derivative action. We agree that CSX was entitled to judgment on the FELA claim. We believe, however, that the question of Mr. Dixon's contributory negligence was properly submitted to the jury.

A.

Mr. Dixon was indisputably employed by SWIB at the time of the accident. He contended at trial that he was also employed by CSX and therefore that he was covered by FELA. Although generally the question of employment status under the act requires consideration of "factual elements such as to make it one for the jury," in certain circumstances it is properly resolved as a matter of law. *Baker v. Texas & Pac. Ry.*, 359 U.S. 227, 228 (1959); *see also Chicago, R.I. & Pac. Ry. v. Bond*, 240 U.S. 449 (1916) (reversing FELA judgment on ground that decedent was not employed by railroad as a matter of law). due to the peculiar nature of the relationship between SWIB and CSX, and to Dixon's particular assignment at the time of the accident,

we believe that this is such an instance.

An individual is covered under FELA only if he is injured "while he is employed" by a "common carrier by railroad." 45 U.S.C. §51. "Employee" status is established by "proof of a master-servant relationship" under principles of common law. *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 323 (1974).[6] At common law, "there are

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[6]Appellees misplace reliance on *McComb v. Southern Weighing & Inspection Bureau*, 170 F.2d 526 (4th Cir. 1948), and *Walling v. Western Weighing & Inspection Bureau*, 160 F.2d 47 (7th Cir. 1946), which address the employment status of weighing and inspection bureau employees under the Fair Labor Standards Act (FLSA). "[C]ommon law rules ... throw but little light on who are to be deemed employees" under FLSA because employment status under that statute "is to be determined, *not by common law concepts*, but by consideration of Congress' intent in the act to give unprecedented breadth and scope to the term "employment." *McComb v. Homeworkers' Handicraft Coop.*, 176 F.2d 633, 636 (4th Cir.) (emphasis

basically three methods by which a plaintiff [such as Mr. Dixon] can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another." *Id.* at 324. Mr. Dixon relies on two of these three methods, claiming that he was either a servant acting for multiple masters, one of which was CSX, or a subservant of a company that itself was a servant of appellant. *See id.*; Appellees' Br. at 11. Under both theories, he must prove that at the time of his injury he was "employed *to perform services in the affairs of [the defendant*

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added), *cert. denied*, 338 U.S. 900 (1949); accord *Blankenship v. Western Union Tel. Co.*, 161 F.2d 168, 169 (4th Cir. 1947). In contrast, the employment inquiry under FELA "[is] to be determined by reference to common-law principles." *Kelley*, 419 U.S. at 323.

railroad] and ... with respect to the physical conduct in the performance of the services [was] *subject to [that railroad's] control or right to control*." *Kelley*, 419 U.S. at 324 (quoting *Restatement (Second) of Agency* §220(1)) (emphases added);[7] *see also Linstead v. Chesapeake & O. Ry.*, 276 U.S. 28, 33-34 (1928) (master-servant relationship for

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[7]The Court in *Kelley* also observed that §220(2) of the *Restatement* "recites various factors that are helpful in applying" the definition of "servant" found in §220(1). *Id.* Appellees point out that Mr. Dixon satisfied several of the factors discussed in the *Restatement* indicating that one is a servant (as opposed to an independent contractor), such as those found in §§220(2)(f) (employment for a considerable period of time with regular hours) and 220(2)(g) (monthly salary instead of payment by the job). *See* Appellees' Br. at 10-11. We fail to see how these facts assist Mr. Dixon in this case, however, since they merely tend to show that he was a general servant of SWIB, not that he was under the control or subject to the control of CSX. *See Kelley*, 419 U.S. at 327 n.9.

FELA purposes depends on existence of power of railroad to control and direct the performance of services for it by plaintiffs).

SWIB at the time of the accident, was a nonprofit unincorporated association of some sixty-eight member railroads, including CSX.[8] The

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[8]Appellees rely on a number of cases that discuss employment relationships in partnerships or joint ventures. Most of these, *see, e.g., Berger v. Mead*, 127 Mich. App. 209, 338 N.W.2d 919 (1983); *Conner v. El Paso Natural Gas Co.*, 123 Ariz. 291, 599 P.2d 247 (Ariz. App. 1979), are workers' compensation cases implicating state statutes whose relevance to a FELA inquiry, if any, is tenuous. Even if these cases were applicable, they are distinguishable. Members of unincorporated associations lack the power of control over employees that inheres in partners or joint venturers. *Compare Conner*, 599 P.2d at 249 ("Where a joint venture exists, each of the parties is the agent of the others and each is likewise a principal of the others so that the act of one is the act of all.") *with Feldman v. North British & Mercantile Ins. Co.*, 137 F.2d 266, 268

association's purposes and goals were:

> to obtain, through inspection and supervision, correct and uniform weighing, classification, marking and packing of freight; the establishment and supervision of weight agreements with shippers and consignees; the policing of transit privileges; [and] the prevention of loss and damage....

J.A. at 1126. SWIB was governed by a general committee comprising one officer from each member railroad, which committee "was empowered to review any

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(4th Cir. 1943) (mere membership in unincorporated association does not subject members to liability for unlawful acts of association); see also *Stafford v. Wood*, 234 N.C. 622, 68 S.E.2d 268, 270-71 (1951) (discussing common law status of unincorporated associations).

The other state workers' compensation cases cited by appellees, see Appellees' Br. at 13 nn. 8 & 9, are similarly inapposite because the plaintiffs in those cases concededly were employed by more than one independent business. *See, e.g., Hatter v. Lenox*, 206 Pa. Super. 263, 212 A.2d 916 (1965).

action of the Southern Weighing and Inspection Bureau at any time [it] chose to." *Id.* at 517; *see also id.* at 1127-28, 1137. Each member of the general committee possessed only one vote, regardless of the volume of SWIB services used by his respective railroad. *Id.* at 515-17, 651, 1127-28. The general committee elected an executive committee, each of the ten members of which was the chief traffic officer of a member railroad. The executive committee, in turn, appointed an administrative committee from among its members to resolve "administrative and ministerial matters." *Id.* at 1128-29. Although CSX and Southern Railway were the two largest member-users of SWIB's services and played central roles on both the executive and administrative committees

in 1985, control of SWIB rested with the general committee as a whole.

SWIB existed and operated independently of each of its member railroads. It had its own rules and employees and operated under a continuing obligation to maintain the business affairs of each of its members confidential from the other member railroads. *Id.* at 543-45, 547-48. The day-to-day operations of SWIB were managed by the association's general manager, subject to the supervision of the committees. The general manager and his subordinates, who typically assigned traveling agents such as Mr. Dixon to tasks at the request of member railroads, were all SWIB employees. *Id.* at 546-47, 1129.

The wages and expenses of traveling agents were not charged directly to the railroad for which they worked on a given day; instead, all of the hours worked by all of the traveling agents for the various SWIB members in a given month were totalled, and each railroad contributed an amount to an accounting fund based on its proportionate share of the total work performed by the agents during the month. The agents were then paid by SWIB, with monies from this fund. *Id.* at 523-26, 634-35. CSX paid 56.15% of the wages and expenses of the SWIB traveling agents during the month of Mr. Dixon's injury, because the agents collectively devoted that percentage of their total time that month to the performance of tasks for CSX. *Id.*

At the time of the accident, Mr. Dixon was *en route* to Blacksburg, South Carolina, at the specific direction of his SWIB division manager. In Blacksburg, he was to install a transit agreement[9] for the shipment and storage of wood pulp belonging to the International Paper Company, which was to be transported by Southern Railway. *Id.* at 521-22, 539-40, 587-88. As the appellees concede, had Mr. Dixon reached his job site in Blacksburg, he would have

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[9]Under SWIB's Articles of Organization, SWIB's general manager and SWIB personnel were responsible for the installation and supervision of transit agreements. *Id.* at 1129. "A transit agreement allows a shipper to have one through rate for his shipment from point of origin to point of ultimate destination rather than a combination of rates to and from a storage facility where the goods might be temporarily stopped or stored." Appellant's Br. at 10 n.4; *see* J.A. at 522, 539.

been "bound by [Southern Railway's] rules and used that railroad's equipment to perform the job." Appellees' Br. at 3; J.A. at 572-76. Since the transit agreement was to be installed for the benefit of Southern under tariffs filed by that railroad, Mr. Dixon's time for that day was allocated to Southern.[10] *Id.* at 523-24. CSX had no tracks running

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[10]Appellees suggest that the transit agreement was "of at least some potential value to CSX" because the rates set by the agreement and the tariffs filed by Southern would apply to any railroad that hauled the wood pulp. Appellees' Br. at 3, 13. Appellees, however, offered no evidence that CSX would have hauled any of the pulp and, as discussed *infra*, CSX had no tracks to the city where the pulp was stored. Even if CSX could be said to have received some tangential benefit from Southern's transit agreement and tariffs, the Supreme Court has cautioned against concluding that those who merely perform services for railroads under published tariffs are railroad employees for purposes of FELA. *Kelley*, 419 U.S. at 326 n.7.

to Blacksburg, and no CSX employee would have met Dixon there; in fact, CSX had no knowledge that Dixon had even been dispatched to Blacksburg to install Southern's agreement, because, as noted, SWIB prohibited its employees from discussing one member's affairs with another. *Id.* at 541, 543-45, 547-48, 590-91.

Under these circumstances, we do not believe that jurors, applying the factors set forth in *Kelley*, could reasonably conclude that Mr. Dixon was employed by CSX at the time of his injury. *See Baker*, 359 U.S. at 228. Mr. Dixon clearly was not performing services for CSX. As a SWIB traveling agent, he was on assignment to perform services on behalf of SWIB member Southern Railway. Even if Mr. Dixon were deemed to be

performing services for each member railroad whenever he performed services for any one of the railroads or for SWIB as an association, and thus were regarded as having been performing services for CSX at the time of the accident, he certainly was not in any sense subject to CSX's control during the performance of these services. *See Bond*, 240 U.S. at 456 (contractor not "employee" of railroad where services were performed for railroad, but railroad "did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished"); *Metzger v. Western Md. Ry.*, 30 F.2d 50, 51 (4th Cir. 1929) (physician employed by railroad to treat its employees not "employee" for FELA purposes because physician "exercises his own judgment

free from the company's control or supervision"). He was subject to control only by SWIB and, arguably, Southern Railway. CSX did not even know where Mr. Dixon was at the time of the accident or what work he had been assigned to perform that morning. And because his time on the day of the accident was allocated to Southern, he was effectively paid for his services on that day not by CSX, but by Southern Railway.

Appellees argued in their brief that the FELA employment question was properly submitted to the jury, but then asserted at oral argument that, indeed, CSX was Mr. Dixon's employer as a matter of law, because of either its control over SWIB or merely its membership in SWIB. Acceptance of this latter argument would require that we ignore the independent

organizational form of SWIB, or at least the relationship of CSX to SWIB, which we refuse to do. There was no identity, in fact or in law, between SWIB and its members. *Cf. Seaboard Coast Line R.R. v. Gillis*, 294 Ala. 726, 321 So.2d 202, 206 (1975) (identity between a railroad partnership and its two railroad company partners for FELA liability purposes). SWIB was, as noted, an unincorporated association. Its members were not partners or joint venturers, they did not have the powers of partners or joint venturers, and they cannot -- and certainly cannot as a matter of law -- be saddled with the full panoply of liabilities that such persons assume.[11]

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[11]Nor was SWIB the wholly-owned subsidiary of any railroad. *See Pelliccioni v. Schuyler Packing Co.*, 140 N.J. Super. 190, 356 A.2d 4 (1976) (jury

Cf. Perpetual Real Estate Servs. v. Michaelson Properties, Inc., 974 F.2d 545 (4th Cir. 1992) (affirming need for respect of corporate form). In any event, while it is true that CSX was one of the two members who used SWIB's services most at the time of the accident, it can hardly be said that it "controlled" the association as a matter of law when it possessed only one of sixty-eight votes in SWIB's general committee, the only body that had final decisionmaking authority on behalf of the association. *See* J.A. at 515-17, 651, 1127-28.

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question whether employee of wholly-owned subsidiary was also employee of parent under FELA subservant doctrine when subsidiary's main purpose was to further railroad business of parent).

We hold, therefore, that as a matter of law Mr. Dixon was not employed by CSX at the time of the accident in question. The district court accordingly erred in submitting to the jury the question of his employment status with CSX.

B.

CSX also moved unsuccessfully for a directed verdict and later for JNOV on the Dixons' state law claims on the ground that Mr. Dixon was contributorily negligent as a matter of law. When determining whether JNOV was properly denied on these claims, we must consider the evidence in the light most favorable to the nonmoving party, here the Dixons, *Hunter v. Seaboard Coast Line R.R.*, 443 F.2d 1319, 1323 (4th Cir. 1971), mindful, however, that "more than a 'mere scintilla' of evidence is necessary to

defeat the motion." *Persinger v. Norfolk & W. Ry.*, 920 F.2d 1185 (4th Cir. 1990) (citation omitted); *cf. Neal v. Booth*, 287 N.C. 237, 214 S.E.2d 36, 39 (1975) ("Defendant's motion for a directed verdict on the ground of ... contributory negligence cannot be sustained unless plaintiff's evidence, taken as true and interpreted in the light most favorable to plaintiff, so clearly shows [contributory] negligence ... that it will support no other conclusion as a matter of law."). Applying this standard of review and the controlling North Carolina precedent, we conclude that the district court properly denied CSX's JNOV motion on the Dixons' state law claims.

North Carolina law imposes reciprocal duties of reasonable care on motorists and train operators approaching

grade crossings. At railroad crossings, motorists "must protect themselves by diligently using their senses for self-preservation." *Cecil v. High Point, T. & D.R.R.*, 269 N.C. 541, 153 S.E.2d 102, 105 (1967). They must look and listen for approaching trains from a position of safety, if there is one, so that their caution is meaningful. *See Carter v. Atlantic Coast Line R.R.*, 256 N.C. 545, 124 S.E.2d 561, 563 (1962); *Coltrain v. Atlantic Coast Line R. Co.*, 216 N.C. 263, 4 S.E.2d 853, 857-58 (1939). Because "[t]he train has the right of way at the crossing," "it is the duty of the driver of the automobile who sees, or should see, the approaching train in time to stop, to do so." "*Cox v. Gallamore*, 267 N.C. 537, 148 S.E.2d 616, 621 (1966). North Carolina law, however, "does not

impose upon the driver of a motor vehicle, on his approach to a public crossing, the duty, under all circumstances, to stop his vehicle before driving on the crossing." *White v. North Carolina R. Co.*, 216 N.C. 79, 3 S.E.2d 310, 315 (1939) (quoting *Harris v. Black Mountain Ry.*, 199 N.C. 798, 156 S.E. 102 (1930)).

Train operators, too, must exercise reasonable care. "[I]t is the duty of the engineer to give signals and exercise vigilance in approaching [grade] crossings." *Coltrain*, 4 S.E.2d at 857. Although "[their] failure to do so does not relieve the [motorist] of the duty to exercise due care for his own safety," operators are "under duty to give [motorists] timely warning of the approach of [their] train to a public

crossing." *Irby v. Southern Ry.*, 246 N.C. 384, 98 S.E.2d 349, 354 (1957). And under North Carolina common law, railroad companies must maintain automatic warning devices at crossings if the crossings are "so dangerous that prudent persons cannot use them with safety unless extraordinary protective means are used." *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 161 S.E.2d 590, 600 (1968) (quoting 74 C.J.S. Railroads §727a.).

If the motorist fails in his duty of reasonable care, and his negligence contributes proximately to his injury, his recovery is barred, even if the railroad is also negligent. *See, e.g., Irby*, 98 S.E.2d at 354; *Harrison v. North Carolina R. Co.*, 194 N.C. 656, 140 S.E. 598, 601 (1927). As CSX notes, the North Carolina courts enforce the motorists'

duty strictly, and they have not been chary about holding drivers contributorily negligent as a matter of law. Indeed, "*the general rule* ... is that a motorist is contributorily negligent in approaching a railroad track if he does not see what he could have seen even if he had to come to a stop to do so." *Miller v. Davis*, 71 N.C. App. 200, 321 S.E.2d 470, 471 (1984) (emphasis added), *disc. review denied*, 313 N.C. 331, 327 S.E.2d 892 (1985).

CSX contends that the general rule should apply in this case, arguing that the evidence presented at trial unequivocally proved as a matter of law that there was a point of safety somewhere north of the tracks along the Rhyne Road where Mr. Dixon could have stopped and from which he should have

seen or heard the oncoming train. We disagree. The North Carolina Supreme Court has repeatedly recognized that "[n]o inflexible rule can be laid down as to what constitutes contributory negligence as a matter of law, as each case must be decided on its own facts." *Ramey v. Southern Ry.*, 262 N.C. 230, 136 S.E.2d 638, 643 (1964). That court, however, has been especially reluctant to take from the jury the question of a motorist's contributory negligence where there is evidence that the motorist's view of the railroad tracks in question was obstructed, that the railroad company had violated its duty of care in failing timely to warn that a train was approaching the crossing, or that the motorist exercised reasonable care under the circumstances but was still struck by

the train. In *Mansfield v. Anderson*, 299 N.C. 662, 264 S.E.2d 51 (1980), for example, where a train collided with a tractor-trailer, the tractor-trailer driver himself testified that he would have had a clear view up and down the tracks when he was within three to four feet of the tracks, and that he could have stopped within one to two feet of the tracks without being struck. Given that the view of the tracks was severely obstructed by vegetation until motorists were within feet of the tracks, however, the supreme court held that the question of the driver's contributory negligence should be left to the jury: "[It was] a question for the jury whether any driver ... can safely stop one foot, or one to two feet, from a railroad-track. *Rarely should a court decide the legal effect of*

such minute distances in a negligence action being tried by a jury." 264 S.E.2d at 54 (emphasis added).

Similarly, in *Johnson v. Southern Ry.* (*Johnson II*), 257 N.C. 712, 127 S.E.2d 521 (1962), the supreme court for the second time reversed the nonsuit of plaintiff motorist. The motorist, whose view was obstructed by a building and railroad cars on a spur track, had stopped, looked, and listened thirty feet from the tracks and then proceeded to the crossing, where he was struck. Even though the motorist "might have stopped just short of the mainline track and gained a clear view up the track to the north for a distance which would have permitted him to see the on-coming train in time to avoid collision," the court held that the question of contributory

negligence should have gone to the jury. 127 S.E.2d at 524. After discussing various sight lines, as well as the distance between the motorist's front bumper and his seat, a measurement that would bear on how close to the tracks the driver would have had to move before risking collision, the court stated that "[m]athematical possibilities and the results of exact measurements, showing minimal space in which observations could be made, should not be controlling factors in determining whether nonsuit should be allowed as a matter of law." *Id.*[12]

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[12]In the *Johnson* case, automatic crossing signals had failed to function. As the supreme court later explained in *Mansfield*, however,

> in *Johnson*, the essential error in the nonsuit was the trial court's failure to take

Finally, in *Neal v. Booth, supra*, the North Carolina Supreme Court reversed a directed verdict, holding that a motorist was not contributorily negligent as a matter of law even though he approached a crossing at five miles per hour without ever stopping and the evidence clearly showed that he could have seen the train that killed him when he was still twenty-one feet from the tracks. Because the motorist's view was obstructed until he was twenty-one feet from the tracks, the train gave no warning of its approach, and the

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> properly into account the obstruction to the view of the motorist and in placing too much stress on the evidence that the motorist might have gained a clearer view up the track had he stopped just short of it.

264 S.E.2d at 55.

automatic signal did not function, the court held that contributory negligence presented a jury question. The court focused on the combination of circumstances at the crossing, stating that "[w]here there are obstructions to the view and the traveler is exposed to sudden peril, without fault on his part, and must make a quick decision, contributory negligence is for the jury." 214 S.E.2d at 40 (quoting *Johnson v. Southern Ry. (Johnson I)*, 255 N.C. 386, 121 S.E.2d 580, 582 (1961)).[13]

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[13]*Mansfield*, *Johnson*, and *Neal* are only several of the most recent railroad crossing accident cases in which the North Carolina Supreme Court, after undertaking the fact-specific inquiry outlined in *Ramey*, 136 S.E.2d at 643, has left to the jury the question of the motorist's contributory negligence. Other examples include *Coltrain*, *supra*; *White*, *supra*; *Moseley v. Atlantic Coast Line R.R.*, 197 N.C. 628, 150 S.E. 184 (1929); *see also Miller v. Davis*, *supra*

The circumstances of the present case are sufficiently analogous to *Hunter*, *Mansfield*, *Johnson*, and *Neal* that we must reject CSX's argument that it was entitled to JNOV on the Dixons' state law claims. CSX does not dispute that Dixon could not have seen the approaching train from Highway 27; the train would only have become visible at some point along the fifty-eight foot stretch of Rhyne Road between the highway and the crossing, leaving Dixon a short time at best in which to react. *Cf. Hunter*, 443

(holding that contributory negligence was a jury question under the circumstances).

In a case applying North Carolina law, this court has also held that the question of a motorist's contributory negligence was for the jury, where the driver's view was obstructed, the driver had little time to react to a fast-moving train, and the train failed to warn on its approach. *See Hunter*, 443 F.2d at 1320-23.

F.2d at 1323 (Haynsworth, C.J. concurring) (because there was "such a short space in time and in distance in which [the motorist] could have observed the train approaching," it could not be said that "his failure to effectively avail himself of that fleeting opportunity was negligence as a matter of law"). There was no evidence introduced that Dixon approached the crossing recklessly; in fact, the testimony suggested that he was "almost stopped" as he proceeded slowly southward down Rhyne Road, and that he did look for oncoming trains. J.A. at 252; 213-14. Certainly, viewing the evidence in the light most favorable to Dixon, a jury could reasonably have concluded that Dixon actually stopped, looked, and listened

before entering the crossing.[14] *See id.* at 249-52. There was, moreover, considerable testimony that Dixon's view of the tracks from in and around the crossing was obscured by, among other things, the three- to four-foot embankment covered with one- to two-foot tall weeds that ran along the northern edge of the CSX tracks to the east of the crossing. *See id.* at 205-06;[15] *cf. Mansfield*, 264 S.E.2d at 53 (trees, briars, and fence severely obstructed motorists' view of tracks); *Neal*, 214 S.E.2d at 39 (depot, autos, and boxcars

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[14]CSX appears to concede that if motorists do "stop, look and listen as North Carolina law requires but [are] still unable to avoid an accident," the question of contributory negligence is for the jury. Reply Br. at 8 n.4.

[15]A local resident warned CSX about this obstruction several times before the accident. *Id.* at 268-69.

obstructed view). Indeed, CSX's own accident report recited that the obstructed view of the tracks was a cause of the accident. *See* J.A. at 292-93, 333.

The jury also reasonably could have found that Dixon was not given timely warning of the train's approach because the CSX trainmen did not sound their whistle until they were 200 feet from the crossing, despite CSX rules requiring that the whistle be blown at a whistle-post located 1,570 feet east of the crossing. *Id.* at 211, 218, 253-54, 279-81; *see also Neal*, 214 S.E.2d at 39 ("A traveler on the highway has the right to expect timely warning" of a train's approach). The Dixons also offered extensive expert testimony from Dr. Kenneth Heathington, from which the jury

could reasonably have concluded that the Rhyne Road crossing was extrahazardous and that CSX should have installed automatic warning signals.[16] *See, e.g.*, J.A. at 390; *see also Price*, 161 S.E.2d at 600. Finally, there was ample evidence from which a reasonable jury could have concluded that there was no point north of the crossing at which Mr. Dixon could have stopped his long-nosed Buick and looked and listened for an approaching train without putting himself in danger of being struck by a train, particularly given that railroad cars overhang the tracks by as much as two feet. *See* J.A. at 585 ("[T]he front of [Dixon's] car would have to have been

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[16]We reject CSX's argument that this testimony was inadmissible. *See infra* Part IV.B.

almost on the track for him to get a clear view ... of the grade to see the train coming." (emphasis added)); *id.* at 268 (a driver could not see up the tracks until he stopped the "nose of [his] vehicle within three or four feet" of the tracks); *cf. Mansfield*, 264 S.E.2d at 53-54 (contributory negligence for jury in same situation).[17] To be sure, CSX offered evidence and testimony, including photographs of the accident scene and sight lines established by a surveyor, that would support a conclusion that Mr. Dixon was contributorily negligent. Contrary to appellant's contentions, however, this evidence and testimony was

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[17]The North Carolina Supreme Court has held in several cases that contributory negligence is for the jury even where the motorist failed to stop at an acknowledged point of safety. *See, e.g., Mansfield, supra; Neal, supra.*

not such as to allow us to conclude that Dixon was contributorily negligent as a matter of law.[18] The question of

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[18]Each of the cases cited by CSX in support of its claim that Dixon was contributorily negligent as a matter of law, *see* Appellant's Br. at 17-19, is distinguishable on its facts from the instant case. *See Ramey, supra* (plaintiff approached crossing at excessive speed, failed to stop or look, and had a largely unobstructed view within twenty-two to twenty-five feet of crossing); *Carter, supra* (plaintiff approached crossing at excessive speed and admitted seeing train while still thirty feet from crossing); *Arvin v. McClintock*, 253 N.C. 679, 118 S.E.2d 129 (1961) (plaintiff's intestate failed to see train although evidence unquestionably showed he could have seen it when at least twelve to fifteen feet from the crossing and perhaps when ninety feet from the tracks); *Dowdy v. Southern Ry.*, 237 N.C. 519, 75 S.E.2d 639 (1953) (plaintiff had unobstructed view within twenty-five to forty-seven feet of crossing but did not stop or look in the direction from which he was struck until he was already on tracks); *Jones v. Atlantic Coast Line R. Co.*, 235 N.C. 640, 70 S.E.2d 669 (1952) (motorist unquestionably had unobstructed view of approaching train when within twenty-seven to thirty feet of crossing); *Parker*

contributory negligence ultimately comes down to whether Mr. Dixon should have better used the few feet of space he had in which to make a decision, and "[r]arely should a court decide the legal effect of such minute distances in a negligence action being tried by a jury." *Mansfield*, 264 S.E.2d at 54. We therefore hold that the district court

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v. Atlantic Coast Line R. Co., 232 N.C. 472, 61 S.E.2d 370 (1950) (plaintiff had unobstructed view of approaching train when within fifteen feet of crossing); *Jeffries v. Powell*, 221 N.C. 415, 20 S.E.2d 561 (1942) (plaintiff had unobstructed view when within thirty to forty feet of crossing); *Miller v. North Carolina R. Co.*, 220 N.C. 562, 18 S.E.2d 232, 234 (1942) (plaintiff stopped eight or ten feet in front of first rail of double-tracked crossing when the far tracks were blocked by a freight train; although his view of the nearer tracks was unobstructed, when the freight train was moved, plaintiff, having "failed to see the obvious," proceeded forward and was struck by a passenger train traveling on the nearer tracks).

properly submitted the question of Mr. Dixon's contributory negligence to the jury.

IV.

Finally, CSX argues that the district court erred in admitting certain testimony of two of the Dixons' experts bearing on ultimate issues of liability under both the FELA and state law claims.

A.

Over CSX's objections, the district court allowed Dr. Harry L. Synder, a "human factors expert," to testify regarding an observational survey of motorists who crossed the CSX tracks on Rhyne Road, which he conducted on two mornings three years after the accident. Snyder informed the jury that 96% of the motorists approaching the crossing from the north, as Mr. Dixon had done, did not

stop, and that 64% failed to look to their left -- the direction from which Mr. Dixon was struck -- before entering the crossing. J.A. at 427-32. During closing arguments, Mr. Dixon's counsel told the jury that, since Dixon had in fact looked to his left before entering the crossing, and since Dr. Snyder's "very scientific study" showed that 64% of drivers do not look left, Dixon had "[driven] better than everybody else out there" and so "was not contributorily negligent." *Id.* at 976-77.

Expert testimony, like all other evidence, must meet the requirement of Fed R. Evid. 403 that its prejudicial effect not substantially outweigh its relevance. *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986). Dr. Snyder admitted that his testimony

and his survey failed to take into account any of the legal duties imposed by North Carolina law on motorists approaching grade crossings. J.A. at 474-76. Even if, as the Dixons claim, the jury was adequately apprised of those duties, we believe that the admission of the survey testimony was error. Dr. Snyder's survey results are wholly irrelevant to the question of whether Mr. Dixon fulfilled his burden to act as a reasonably prudent person, a burden that the North Carolina Supreme Court has defined with specificity, *see supra* at 15-16, when he approached the crossing on November 8, 1985. At most, the survey revealed that a significant number of motorists approaching the crossing do so somewhat carelessly. As CSX rightly points out, however, "[t]he fact that 64%

or 96% or even 100% of the motorists do not comply with the duties imposed upon them by law [does] not excuse them or Mr. Dixon from satisfying those obligations." Appellant's Br. at 27-28. At the same time, admission of this testimony was clearly prejudicial to CSX because it strongly suggested that Mr. Dixon was a more careful driver than most and that therefore he could not be considered contributorily negligent.

The admission of expert testimony under Fed. R. Evid. 702 is generally left to the sound discretion of the district court. *See, e.g., United States v. Portsmouth Paving Corp.*, 695 F.2d 312, 323 (4th Cir. 1982). However, because the jury could not find Mr. Dixon innocent of contributory negligence based on the behavior of drivers in Dr.

Snyder's survey, we believe that the admission of the survey testimony was reversible error. *See Scott*, 789 F.2d at 1055-56; *see also Andrews v. Metro North Commuter R.R.*, 882 F.2d 705, 710 (2d Cir. 1989) (admission of plaintiff's expert's testimony constituted reversible error when, *inter alia*, testimony was not based on applicable standard of care).[19]

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[19]The cases cited by appellees in no way support the admission of Dr. Snyder's testimony. In both *Vancamp v. Burgner*, 99 N.C. App. 102, 392 S.E.2d 453 (1990), *aff'd*, 328 N.C. 495, 402 S.E.2d 375 (1991), and *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 3024 (1992), the admissibility of certain behavioral evidence was unquestioned, in all likelihood because it was obviously relevant to the legal standards applicable under North Carolina's last clear chance doctrine, *see* 392 S.E.2d at 454-55, and Georgia's law governing the duty of trains to warn of their approach to crossings, *see* 933 F.2d at 1558-60, respectively.

B.

Another of the Dixons' experts, Dr. Heathington, testified at length regarding the characteristics of the Rhyne Road crossing from a civil engineering perspective. He opined that the crossing was extrahazardous and that CSX should have installed automatic warning devices. J.A. at 338-90. The jury eventually found that the crossing was extrahazardous and that the railroad was negligent in failing to install active warning devices. CSX challenges the admission of Dr. Heathington's testimony, arguing that it did not "comport with the underlying legal standard governing the issue in question." Appellant's Br. at 28.

CSX correctly observes that under North Carolina common law, railroads are

required to install active warning devices at grade crossings only if those crossings are "extrahazardous" or "ultra hazardous." "[M]echanical warnings ordinarily are required only at crossings so dangerous that prudent persons cannot use them with safety unless extraordinary protective means are used." *Price*, 161 S.E.2d at 600. CSX takes issue with Dr. Heathington's testimony, asserting that it does not precisely track the standard enunciated in *Price*. Dr. Heathington told the jury that

> [t]here are some crossings because of their design and operation and so forth, that places [sic] a driver at risk, even though you are a reasonable and prudent driver, *you have placed your life at risk by using that crossing, because of the deficiencies in that crossing*. And that is what would apply to this crossing here, *it is an extrahazardous crossing*. Any

> of us in this room would place our lives at extra risk in using that crossing.

J.A. at 390 (emphases added). Dr. Heathington's testimony was clearly relevant to the issue of whether the CSX crossing was extrahazardous under North Carolina law, and any difference between the language that he used and that used by the North Carolina Supreme Court in *Price* is, at most, immaterial. The district court accordingly did not abuse its discretion by admitting this testimony. *See Scott*, 789 F.2d at 1055; *Portsmouth Paving*, 694 F.2d at 323.[20]

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[20]We do not reach CSX's alternative contention that the district court should not have admitted Dr. Heathington's testimony because any common law duty owed by the railroad to install automatic warning devices at extrahazardous crossings has been preempted under §205 of the Federal Railroad Safety Act, 45 U.S.C. §434. This question has divided the courts, *compare Marshall* v.

V.

The alternative judgments against CSX entered by the district court on the jury verdicts are vacated. Because we hold as a matter of law that Mr. Dixon was not employed by CSX at the time of the accident and therefore that he was not covered by FELA, the case is remanded for retrial solely on the Dixons' state law claims, the trial to be conducted in a manner consistent with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS

WILKINSON, Circuit Judge, dissenting:

Burlington Northern, Inc., 720 F.2d 1149, 1154 (9th Cir. 1983) (no preemption) *with Hatfield v. Burlington Northern R.R.*, 958 F.2d 320, 324 (10th Cir. 1992) (finding preemption) *and Easterwood, supra* (no preemption), and the Supreme Court has granted *certiorari* in *Easterwood* to resolve this conflict. 112 S. Ct. 3024 (1992). The Court's disposition of Easterwood, of course, may well affect the proceedings in this case on remand.

I would affirm the judgment of the district court. I wholeheartedly agree with the majority that Mr. Dixon was not contributorily negligent as a matter of North Carolina law, and that the Dixons' state law claims were properly submitted to the jury. In my view, however, the majority's arguments go further than that. They establish not only that the Dixons' state law claims were properly submitted to the jury, but also that they were properly resolved.

To illustrate, I can do no better than to quote from the majority opinion. "CSX does not dispute that Dixon could not have seen the approaching train from Highway 27; the train would only have become visible at some point along the fifty-eight foot stretch of Rhyne Road between the highway and the crossing,

leaving Dixon a short time at best in which to react." Majority Op. at 18. "There was no evidence introduced that Dixon approached the crossing recklessly; in fact, the testimony suggested that he was 'almost stopped' as he proceeded slowly southward from Rhyne Road, and that he did look for oncoming trains." *Id.* at 19. "There was, moreover, considerable testimony that Dixon's view of the tracks from in and around the crossing was obscured by, among other things, the three- to four-foot embankment covered with one- to two-foot tall weeds that ran along the northern edge of the CSX tracks to the east of the crossing." *Id.* at 19. "Finally, there was ample evidence from which a reasonable jury could have concluded that there was no point north of the crossing

at which Mr. Dixon could have stopped his long-nosed Buick and looked and listened for an approaching train without putting himself in danger of being struck by a train, particularly given that railroad cars overhang the tracks by as much as two feet." *Id.* at 19-20.

There is ample reason therefore to credit the jury's determination that Dixon was not contributorily negligent. Given this documented support in the majority opinion for the jury's state law verdict, I am at a loss to understand why we should remand this case for another lengthy and exhaustive trial. The justification apparently lies in the prejudicial effect of a pair of trial errors alleged by the majority in its opinion. The prejudicial effect of these errors -- if indeed they be errors -- is

not sufficient to cast any legitimate doubt on the validity of the jury's state law verdict.

I.

The first of the alleged trial errors is the district court's refusal to bifurcate the issue of coverage under the Federal Employers' Liability Act from the issue of substantive liability. The majority appears to offer three rationales for why this refusal to bifurcate might warrant a new trial. Each in my view fails.

The first rationale is that the joint trial of the FELA and state claims allowed the jury to hear "highly prejudicial" and "inflammatory" evidence about Mrs. Dixon's loss-of-consortium claim -- evidence that was only relevant to the Dixons' state law claim, since

FELA does not award damages for loss of consortium. Majority Op. at 5. This argument cannot support a new trial. Since North Carolina law permits recovery for loss of consortium, any prejudice from the loss-of-consortium evidence as to the Dixons' common law claims would have been, by definition, proper.

The second rationale is that the joint trial allowed the jury to hear testimony about whether Mr. Dixon was an employee of CSX, which was "wholly irrelevant to the Dixons' state law claims and undoubtedly prejudicial to CSX." Majority Op. at 6-7. This argument is no more persuasive than the first. The testimony about whether Dixon was an employee of CSX was certainly irrelevant to the state law claims, but it was hardly inflammatory or unduly

prejudicial. The majority alludes to the closing arguments in which the Dixons' counsel accused CSX of being a ruthless employer which had bullied its employees, and implies that these statements somehow subsumed and tainted the testimony about whether Dixon was an employee of CSX. Majority Op. at 6-7. This point stands only if the closing argument by itself was reversible error, a ruling the majority appears unwilling to make. Majority Op. at 6 n.4. In the context of such a long and drawn-out trial, I have difficulty believing that some closing remarks, to which CSX did not object at trial, could seriously have affected the jury's verdict.

The final rationale is that the joint trial caused "considerable jury confusion," because the jury had to

resolve two alternative claims. Majority Op. at 7. I find nothing to back this bald contention except conjecture. Civil plaintiffs assert alternative theories of recovery all the time. Next to the issues posed in a large antitrust or commercial contract dispute, the issues in this case pale in their complexity and scope: How fast did Mr. Dixon approach the crossing? Did he stop first to look for an oncoming train? How clear was his view down the tracks? Did he have enough time to spot the oncoming train and get out of the way? These are just the sorts of determinations for which juries are best suited. In this case, moreover, the district court took particular care to keep the FELA and state law standards distinct, by bifurcating the charges to the jury, and by allowing the litigants

to make separate closing arguments about each claim. Unless we have lost faith in the capacity of juries to resolve civil disputes, the assertion that the joint trial somehow confused the jury must fail.*

II.

The second error that the majority alleges is the admission of testimony by the "human factors engineer," Dr. Harry Snyder. At trial, Dr. Snyder testified about how other motorists under his observation had approached the Rhyne Road crossing: 96% did not come to a full stop, and 64% failed to look to their left, the direction from which Mr. Dixon was struck. According to the majority, "Dr. Snyder's survey results are wholly irrelevant to the question of whether Mr. Dixon fulfilled his burden to act as a

reasonably prudent person, a burden that the North Carolina Supreme Court has defined with specificity...." Majority Op. at 22. "The fact that 64% or 96% or even 100% of the motorists do not comply with the duties imposed upon them by law [does] not excuse them or Mr. Dixon from satisfying these obligations." *Id.* In other words, North Carolina defines the motorist's duty of care in firm rules that have no reference to local custom. Hence evidence like Dr. Snyder's survey is inadmissible.

This is a startling proclamation, given the long common law tradition to the contrary. "[E]vidence of the usual and customary conduct of others under similar circumstances is normally relevant and admissible, as an indication of what the community regards as proper,

and a composite judgment as to the risks of the situation and the precautions required to meet them." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §33, at 193 (5th ed. 1984) (Lawyer's ed.) (footnote omitted). Before departing from this practice here, I should expect to see some North Carolina authority stating that local custom is never a measure of due care at railroad crossings, or that the common law rules of how a motorist should approach a crossing do not take account of local circumstances. The majority provides no such authority; indeed, it ably demonstrates the opposite. "North Carolina law ... does not impose upon the driver of a motor vehicle, on his approach to a public crossing, the duty, under all circumstances, to stop his

vehicle before driving on the crossing." Majority Op. at 15 (quoting *White v. North Carolina R. Co.*, 3 S.E.2d 310, 315 (N.C. 1939) (internal quotations omitted)). "No inflexible rules can be laid down as to what constitutes contributory negligence as a matter of law, as each case must be decided on its own facts." Majority Op. at 16 (quoting *Ramey v. Southern Ry.*, 136 S.E.2d 638, 643 (N.C. 1964)).

Thus it was within the district court's discretion to conclude that Dr. Snyder's survey was relevant to whether Dixon was contributorily negligent. Moreover, the district court instructed the jurors, when Dr. Snyder testified, that *they* were to determine the weight of his testimony. The danger that the jury attached undue significance to the

evidence of local custom is therefore illusory.

III.

To conclude, the Dixons' state law claims were properly resolved by the jury, and any errors committed by the district court were too slight to have "affect[ed] the substantial rights of the parties." Fed. R. Civ. P. 61 (standard for harmless error). To some, the verdict in this case may seem the product of jury sympathy, but I confess I am not certain how jurors can abandon all feeling for a plaintiff who has been rendered a quadriplegic for life. The question on appeal is not whether the jury was moved by sympathy, but whether it rendered a verdict with a solid foundation in the evidence. I am convinced that it did, for the reasons

set forth so well in the majority opinion. My vote to affirm is an expression of regret that the majority has failed to follow its own survey of the case: "Certainly, viewing the evidence in the light most favorable to Dixon, a jury could reasonably have concluded that Dixon actually stopped, looked, and listened before entering the crossing." Majority Op. at 19.

*The majority points to the identical damages awarded on Mr. Dixon's FELA and state law claims as post hoc evidence of jury confusion. Since the method for calculating damage was different for each claim, the majority reasons that the jury must have been "unable to distinguish between the FELA and the state law claims, *at least*

insofar as the measures of damages were concerned." Majority Op. at 7-8 (emphasis added). The inferential leap from confusion about damages to confusion about liability is not so obvious to me. As the majority seems to concede by its own qualifying phrase, the most this argument proves is the need to remand for retrial on damages alone. In no way does it justify the more drastic remedy of a whole new trial.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division
C-C-88-533-M

LARRY EDWARD DIXON and SALLY DIXON,
Plaintiffs,

-vs-

SEABOARD SYSTEM RAILROAD, INC., a Virginia corporation, SEABOARD SYSTEMS RAILROAD, INC., A Virginia corporation, CSX TRANSPORTATION, INC., a Virginia corporation, and CSX CORPORATION, a Virginia corporation,
Defendants.

MEMORANDUM OF DECISION

R. Kent Brown, 122 N. McDowell Street, P.O. Box 36189, Charlotte, North Carolina 28235, counsel for plaintiff Larry Edward Dixon.

Charles McBrayer Sasser, Cox, Gage & Sasser, Suite 112, 101 N. McDowell Street, Charlotte, North Carolina 28204, counsel for plaintiff Sally Dixon.

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Before James B. McMillan, District Judge

INDEX AND SUMMARY OF DECISION

	PAGE
INDEX	B: i
HISTORY OF THE CASE	B:12
FACTS	B:18
DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE FELA ISSUES IS DENIED	B:26
FELA ISSUES--There was sufficient evidence for the jury to determine the following:	
FELA ISSUE #1--Larry Edward Dixon was an employee of defendant CSX (formerly Seaboard System Railroad) and he was acting within the scope of that employment for purposes of the Federal Employers' Liability Act at the time of his injury, even though his immediate employer was the Southern Weighing and Inspection Bureau	B:26
FELA ISSUE #2--The negligence of defendant CSX was a proximate cause of plaintiff Larry Dixon's injuries	B:31

PAGE

FELA ISSUE #3--Defendant CSX negligently:

(a) Failed to blow its train whistle timely, and this was a proximate cause of plaintiff Larry Dixon's injuries B:32

(b) Failed to clear known visual obstructions from its right-of-way, and this was a proximate cause of plaintiff Larry Dixon's injuries B:35

(c) Maintained the intersection at which this accident occurred in an extra hazardous condition, and this was a proximate cause of plaintiff Larry Dixon's injuries..... B:39

(d) Failed to install an active warning device at the intersection of its track with Rhyne Road, and this was a proximate cause of plaintiff Larry Dixon's injuries B:42

FELA ISSUE #4--There was sufficient evidence to support an award by the jury of:

PAGE

(a) $5,000,000.00 to plaintiff Larry Dixon to compensate him adequately and fairly for his mental and physical injuries .. B:44

(b) $8,609,308.00 to plaintiff Larry Dixon to compensate him adequately and fairly for his financial losses B:48

FELA ISSUE #5--There was sufficient evidence to support the jury's finding that plaintiff Larry Dixon was not contributorily negligent B:54

FELA ISSUE #6--Because the jury found plaintiff Larry Dixon's own negligence was not a proximate cause of his injuries, they did not find that any percentage of his injuries was caused by his own negligence B:57

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE COMMON LAW NEGLIGENCE ISSUES IS DENIED B:58

COMMON LAW NEGLIGENCE ISSUES--
There was sufficient

PAGE

evidence for a jury to determine the following:
COMMON LAW NEGLIGENCE ISSUE #1--The negligence of defendant CSX was a proximate cause of plaintiff Larry Dixon's injury B:58

COMMON LAW NEGLIGENCE ISSUE #2--Defendant CSX negligently:

(a) Failed to blow its train whistle timely, and this was a proximate cause of plaintiff Larry Dixon's injuries B:59

(b) Failed to clear known visual obstructions from its right-of-way, and this was a proximate cause of plaintiff Larry Dixon's injuries B:59

(c) Maintained the intersection at which this accident occurred in an extra hazardous condition, and this was a proximate cause

PAGE

of plaintiff Larry Dixon's injuries B:60

(d) Failed to install an active warning device at the intersection of its track with Rhyne Road, and this was a proximate cause of plaintiff Larry Dixon's injuries B:60

COMMON LAW NEGLIGENCE ISSUE #3--There was sufficient evidence to support the jury's finding that plaintiff Larry Dixon was not contributorily negligent B:60

COMMON LAW NEGLIGENCE ISSUE #4-- The evidence fully supports the jury's award of $13,609,308 to Larry Dixon B:61

COMMON LAW NEGLIGENCE ISSUE #5--The evidence fully supports the jury's award of $1,500,000 to Sally Dixon B:61

DEFENDANTS' MOTION FOR NEW TRIAL IS DENIED B:67

PAGE

A. It was not error to deny defendants' motion to bifurcate the trial, and the defendants were not prejudiced by the admission of evidence allegedly admissible on only one claim B:67

B. Admission of Dr. Kirkwood Shultz's testimony about Mrs. Sally Dixon's mental condition and attempted suicide was not error B:81

C. Admission of evidence that plaintiff Larry Dixon was covered by the Railroad Retirement Act and the Railroad Unemployment Act was not error B:94

D. It was not error to allow witnesses Ernest Royals and Michael Brown to testify that, in their opinion, employees of SWIB were covered by FELA B:105

E. The jury's finding that plaintiff Larry Dixon was covered by FELA was not

PAGE

against the greater weight of the evidence B:115

F. Denial of defendants' request for a new trial on the issues of negligence and of contributory negligence for allowing expert opinion testimony of Dr. Heathington and Dr. Snyder on the extra hazardous nature of the crossing was not error B:117

G. Defendants' request for a new trial on the issues of negligence and contributory negligence based on alleged mistakes in the jury charge on the FELA claim is denied B:125

H. The jury's finding that plaintiff Larry Dixon was not contributorily negligent is not against the greater weight of the evidence B:142

I. It was not error to allow Dr. Harry Snyder to testify about the results of his survey of how other

PAGE

motorists acted in approaching the crossing B:144

J. The award of damages to plaintiff Larry Dixon was supported by the evidence and the jury did not disregard the court's instructions concerning the determination of damages B:154

K. The defendants' request for a new trial on the issues of damages is denied, because the damages awarded by the jury are not excessive and are not against the clear weight of the evidence B:167

L. The defendants' request for a new trial on the damages issues is denied because the award is not against the greater weight of the evidence B:175

M. Allowing the jury to determine the plaintiffs' common law negligence claim after it had returned a verdict that plaintiff Larry Dixon was an employee

PAGE

covered by FELA was not
error B:178

N. The cumulative
effect of all of the claims
of error did not deprive
defendants of a fair trial .. B:188

HISTORY OF THE CASE

This case was tried to a jury in Charlotte, N.C., from June 10, 1991, until June 19, 1991.

Plaintiff Larry Edward Dixon's claim, based on injuries caused by negligence, was submitted to the jury under alternative theories of liability: (1) The Federal Employer's Liability Act (FELA), and (2) North Carolina common law negligence.

Plaintiff Sally Dixon's claim for loss of consortium was also submitted.

In the interest of time and judicial economy and efficiency, the jury heard evidence on all claims and rendered verdicts on all claims.

The jury were first charged on the FELA claim, and were asked to return a verdict on the issues under FELA.

The jury were then charged on the common law negligence claims, and were instructed that their verdict on common law negligence was a conditional verdict, to take effect only if they rendered a verdict in favor of plaintiff under FELA, and if that verdict should be overturned on appeal.

On June 19, 1991, the jury found that plaintiff Larry Dixon was a railroad employee under FELA, acting in the scope of his employment by defendants at the time of his injury; that the defendants' negligence was a proximate cause of the plaintiff's injuries; and that Larry Dixon was not contributorily negligent. Also on June 19, 1991, in a separate verdict, the jury found that plaintiffs were entitled to recover on the facts, based

on common law negligence of the defendants, and that contributory negligence on the part of plaintiff Larry Dixon was not a proximate cause of his injuries.

On July 22, 1991, the court entered judgment, based on the jury verdict, (1) that plaintiff Larry Dixon recover $13,609,308.00 from defendant CSX Transportation, Inc., in his action brought under FELA, and (2) (only in the event that Mr. Dixon's recovery under FELA is not sustained on appeal) that he recover $13,609,308.00 under North Carolina state common law, and that plaintiff Sally Dixon recover $1,500,000.000.

After the verdicts, the defendants filed timely post-verdict motions (1) for judgment notwithstanding the verdict

on the FELA and common law negligence claims and (2) for a new trial.

A lengthy hearing was held on those motions, and briefs were received and studied.

The trial produced ample competent evidence to support the jury's verdict; some of that evidence will be recited. Some of the evidence was in conflict. It is the jury's province to weigh the evidence, and to determine credibility of witnesses. The jury's verdict makes clear that the jury resolved in favor of plaintiffs the questions of witnesses' credibility on critical points in conflict.

Witnesses whose testimony supports the plaintiff's testimony and the jury's verdict include eyewitness Ralph Cox; Ernest Royals, former SWIB General

Manager; Michael Brown, former co-employee with plaintiff Larry Dixon; Donald Cleveland, a man who had lived near the CSX crossing for over twenty years; Sally Dixon, Larry Dixon's wife; Jonathan Dixon, Larry Dixon's son; and several experts. These witnesses presented a demeanor of forthrightness and consistency comporting with all of the indicia of credibility which courts recognize as reliable.

The court has simultaneously entered an order denying defendants' motion for judgment notwithstanding the verdict on the FELA claim, defendants' motion for judgment notwithstanding the verdict on the common law negligence claims, and defendants' motion for new trial. This memorandum of decision will first summarize the evidence, and then

address defendants' two motions for judgment notwithstanding the verdict and defendants' motion for a new trial.

FACTS

On November 8, 1985, plaintiff Larry Dixon, a traveling agent for the Southern Weighing and Inspection Bureau (SWIB), was driving his 1972 Buick Electra 225 west on N.C. Highway 27 in Mecklenburg County, North Carolina, toward the intersection of Highway 27 with Rhyne Road, en route on business to Blacksburg, S.C.

CSX tracks also run east and west, parallel with and about 50 feet to the south of Highway 27.

Mr. Dixon turned left onto Rhyne Road and proceeded south toward the CSX railroad crossing, which is approximately 50 feet from the intersection of Rhyne Road with N.C. 27. (Tr. at 402.) Mr. Dixon was traveling at "a slow rate of speed." (Tr. at 107,

l. 18.) When Mr. Dixon approached and turned onto Rhyne Road, his view of the railroad, looking back to the east from the CSX crossing, was blocked by an embankment and bushes or shrubs, and he could not see very far down the track to his left until he had passed the white line near the crossing. (Tr. at 103.)

A CSX train was also proceeding west toward the Rhyne Road crossing, traveling at a speed estimated by the defendant's engineer to be approximately 40 miles per hour (or 66 feet per second). (Tr. at 182.) Although there was a whistle post to notify the train engineer to blow the whistle 1500 feet from the crossing, an eyewitness, Ralph Cox, testified that the train first blew its whistle when it was only

approximately 200 feet[1] from the Rhyne Road crossing. (Tr. at 92.) The train hit Mr. Dixon as he was crossing the tracks, causing him severe injuries.

Ralph Cox, the eyewitness, was traveling north on Rhyne Road, meeting Mr. Dixon, when the accident happened. The driver's window in his truck was down and the truck had no radio. (Tr. at 83.) He had engaged the clutch to cross the P&N tracks, so that the truck's engine was idling. (Tr. at 83.) As he was crossing the P&N tracks, which run parallel to, and 100 feet south of the CSX tracks (Tr. at 473), Mr. Cox first heard the train whistle. (Tr. at 85.) Mr. Cox testified that when he first heard the whistle, the train was

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[1] 3 seconds time at 40 miles an hour

about 200 feet from the crossing. (Tr. at 92.) Mr. Harry Webb, the brakeman, testified that, from his seat beside the engineer (Tr. at 164), he first saw Mr. Dixon's car when the train was about ten feet from the car (Tr. at 185), and the car was on the tracks when he and the engineer saw it. (Tr. at 185.) The train was unable to stop, and it hit Mr. Dixon's car, resulting in devastating injuries to Mr. Dixon.

The front of the train came to rest 3125 feet (six-tenths of a mile) beyond the crossing. (Tr. at 700.)

As a driver of a car approaches the Rhyne Road intersection while traveling west on N.C. 27, there was, at the time of this accident, a group of trees to the driver's left, between the highway and the railroad, which "obstruct the

vision [of the railroad track by the driver]." (Tr. at 76, l. 21-25, at 77, l. 1-3.) As the driver proceeds further west toward the intersection with Rhyne Road, a quarter mile from the intersection, the driver has only a limited view of the railroad. The track is lower than the highway. (Tr. at 77, l. 9-14.)

As the driver turns from N.C. 27 onto Rhyne Road, Rhyne Road drops down to the level of the railroad track. There is an embankment between N.C. 27 and the CSX track, which comes down to the edge of Rhyne Road. (Tr. at 79-80; Pl. Ex. 25.) The bank is three to four feet higher than Rhyne Road, and weeds growing at the top of the bank were one to two feet higher than the bank itself

on the day of the accident. (Tr. at 80, 98; Pl. Ex. 26.)

Eyewitness Cox, who is familiar with the crossing, testified that in order to see a "comfortable distance" up the track, "The bumper of your car is going to be within a few feet, four or five feet of the track, before you can get a clear view of the track." (Tr. at 105, l. 25, at 106, l. 1-2.) Another witness, Don Cleveland, testified that the nose of the vehicle would have to be within three or four feet of the track before the driver could "see 200-250 feet up the track." (Tr. at 153, l. 2-14.)

The accident report, prepared by the conductor of the train that hit Mr. Dixon, stated that the view of the track

was obscured by "topography." (Pl. Ex. 7.)

When the accident occurred on November 8, 1985, there were no lights, safety bars, or other warning devices at the CSX crossing on Rhyne Road. (Tr. at 78-79.)

The plaintiffs allege that the defendants were negligent on three grounds:

> 1. The engineer failed to blow the train whistle at the whistle post 1500 feet from the crossing, or at any time before 200 feet (3 seconds time) away from the crossing;
>
> 2. The defendants failed to clear known visual obstructions at the crossing; and
>
> 3. The defendants maintained the crossing in an extra hazardous condition and failed to install active warning

devices at the extra hazardous crossing.[2]

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[2]Plaintiffs do not allege that the engineer was negligent in failing to slow or stop the train.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE FELA ISSUES IS DENIED.

Defendants' first motion for judgment notwithstanding the verdict challenged the jury's decisions on the issues brought under FELA.

The trial produced ample competent evidence to support the jury's verdicts. Some of the evidence was in conflict; however, it is the jury's province to weigh the evidence and to determine credibility of witnesses. Six separate issues were submitted to the jury under FELA:

FELA ISSUES--There was sufficient evidence for the jury to determine the following:

> **FELA ISSUE #1.--Larry Edward Dixon was an employee of defendant CSX (formerly Seaboard System Railroad) and he was acting within the scope of that employment for**

purposes of the Federal Employers' Liability Act at the time of his injury, even though his immediate employer was the Southern Weighing and Inspection Bureau.

Larry Dixon, plaintiff, was employed by the Southern Weighing and Inspection Bureau (SWIB) on November 8, 1985, the date of the accident. When the accident occurred, Mr. Dixon was en route to Blacksburg, S.C., to negotiate a tariff that would have been applicable to defendants and to other SWIB member lines. (Tr. at 591-92.)

SWIB was an unincorporated association organized by Class 1 railroads to perform weighing and inspection services for railroads that operated in certain districts as defined by the Interstate Commerce Commission. (Pl. Ex. 11, Admiss. No. 9; Tr. at 567.)

SWIB was formed approximately eighty-five (85) years ago by executives of a number of railroads, including the corporate predecessor of defendant CSX Transportation, Inc. (Pl. Ex. 11, Admiss. No. 5; Tr. at 565-66.)

Seaboard System Railroad (corporate predecessor of CSX Transportation, Inc.) was a member of SWIB for the year 1985. (Pl. Ex. 11, Admiss. no. 2; Tr. at 564.)

Mr. Ernest E. Royals testified that he was the General Manager of SWIB from June 1, 1982, until SWIB's dissolution in 1986. (Tr. at 574.) As General Manager, he directed and controlled SWIB's daily activities. This included the supervision of the traveling agents, plaintiff Larry Dixon and Michael Brown.

Mr. Royals was supervised by the Chairman of the Executive Committee and

the Administrative Committee of SWIB. (Tr. at 585.) The Executive Committee of SWIB was comprised of the chief traffic officers of the member railroads. (Tr. at 584.) The Administrative Committee was made up of three members of the Executive Committee. (Tr. at 585.) Mr. J.J. Paylor, the Director of Pricing Services for Seaboard in 1985, was chairman of the Executive Committee. (Tr. at 744-745.) He was also chairman of the Administrative Committee and was the immediate supervisor of Mr. Royals, the General Manager of SWIB. (Tr. at 585.)

Mr. Paylor was compensated by Seaboard for the time and services he performed on the Administrative and Executive Committees of SWIB. He was

not paid by SWIB for his services. (Tr. at 766.)

Mr. Royals testified, "All authority to all Bureau [SWIB] activities came direct or came down the line from the member railroads just like the organizational chart shows." (Tr. at 608, l. 17-20; Pl. Ex. 13.)

SWIB was a not-for-profit bureau. (Tr. at 581.) Mr. Royals testified that all member line railroads "put on deposit with the accounting and treasury office, a stipulated amount of working fund based on what their expenses would estimate. . . . [The fund] was used as operating expenses [sic], operating money for activities of the Southern Weighing and Inspection Bureau." (Tr. at 581, l. 13-20.)

Seaboard System Railroad paid 56.15% of the salary earned by plaintiff Larry Dixon for the billing period of November 1985, and 56.15% of the expenses incurred by him in conjunction with the services he performed for SWIB. (Pl. Ex. 11, Admiss. No. 14; Tr. at 568.)

At all times during the work day, Mr. Dixon was available to perform services for any and all member railroads of SWIB. (Pl. Ex. 11, Admiss. no. 20; Tr. at 570.)

FELA ISSUE #2.--The negligence of defendant CSX was a proximate cause of plaintiff Larry Dixon's injuries.

There was substantial evidence for a jury to determine that the negligence of defendant CSX was a proximate cause of Larry Dixon's injuries. This

testimony is recited under Issue No. Three, infra.

FELA ISSUE #3.--Defendant CSX negligently:

(a) Failed to blow its train whistle timely, and this was a proximate cause of plaintiff Larry Dixon's injuries;

(b) Failed to clear known visual obstructions from its right-of-way, and this was a proximate cause of plaintiff Larry Dixon's injuries;

(c) Maintained the intersection at which this accident occurred in an extra hazardous condition, and this was a proximate cause of plaintiff Larry Dixon's injuries; and

(d) Failed to install an active warning device at the intersection of its track with Rhyne Road, and this was a proximate cause of plaintiff Larry Dixon's injuries.

Failure to Blow Whistle

Ralph Cox, the eyewitness to the accident, testified that he was familiar with the intersection. (Tr. at 73.) He was driving a vehicle north, approaching the P&N tracks, which lie immediately south of and parallel to the CSX tracks. He looked left and right to be sure there was no train, and began listening for a train on Rhyne Road approximately one quarter of a mile south of the P&N track. (Tr. at 84.) The windows in his truck were rolled down, and the radio was turned off. (Tr. at 85.) Mr. Cox heard the train whistle blow "just as the cab of my truck got up on the P&N track." (Tr. at 85, l. 1-2.) He looked for the train, and saw it on the CSX tracks approximately <u>200 feet</u> from the Rhyne Road crossing. (Tr. at 92.) (Emphasis added.)

Safety rules require a train to begin blowing its whistle 1500 feet from an intersection, and to continue blowing the whistle and ringing the bell until the train passes through the intersection. (Tr. at 235; Pl. Ex. 6.)

Mr. Harry Webb, brakeman on the train that hit Mr. Dixon, admitted under oath that if the train's whistle had been blown at the whistle post 1500 feet from the crossing, he knew of nothing that would have prevented either Mr. Dixon or Mr. Cox from hearing it. (Tr. at 174.)

Expert witness Harry Snyder, a professor at Virginia Polytechnical Institute who teaches courses in both human factors and engineering, testified that it was his opinion that

> [h]ad the whistle been blown as it should have been from 1500 feet and intermittently and then continuously all the way to cross the crossing, then Mr. Cox would have been able, Mr. Dixon would have heard that whistle at a greater distance than he did, and would have had adequate reaction time, perception reaction time to avoid the accident.

(Tr. at 498, l. 15-21.) Dr. Snyder also testified,

> If the whistle were not blown at the whistle post, and were not blown until a distance of approximately 200 feet from the intersection, it is my conclusion that that contributed directly to this accident taking place, that had the whistle been blown earlier, the accident would have had a lower probability of occurrence.

(Tr. at 505, l. 9-15.)

Failure to Clear Visual Obstructions

There was ample testimony at trial to show that visual obstructions existed

which prevented a clear view of the CSX tracks, as well as any trains that could have been proceeding on the tracks, by a driver traveling west on N.C. 27 and then turning left onto Rhyne Road.

An embankment three to four feet high ran east and west between Highway 27 and the CSX tracks to the south of N.C. 27, on the east side of the Rhyne Road intersection. (Tr. at 77, 148, 150.) This substantially blocked a clear view of the tracks or any train on the tracks, by a driver proceeding west along N.C. 27. (Cleveland, Tr. at 150.) Donald Cleveland, a witness who lives near the Rhyne Road crossing, testified, when asked about a driver's view of the CSX tracks as the driver proceeds west on N.C. 27, "The driver's view of the railroad tracks is almost nonexistent

with the exception of the parking lot of that tavern there, which is very limited." (Tr. at 150, l. 13-16.)

From the intersection of N.C. 27, Rhyne Road dips south as it runs toward the CSX tracks. (Tr. at 79.) An earthen embankment, three to four feet high, runs between the highway and the railroad tracks, nearly all the way down to Rhyne Road. (Tr. at 79.) At the time of the accident, weeds and grasses grew one and one-half to two feet high on top of the embankment, effectively erecting a sight barrier of a view east up the CSX tracks for any automobile driver proceeding south on Rhyne Road. (Tr. at 79-80.) Several witnesses, including Mr. Cox, Donald Cleveland, and Michael Brown, all of whom had driven across the CSX crossing on Rhyne Road in

the same direction as Mr. Dixon, testified that, because of the topography of the crossing, a car's front bumper had to be within four or five feet of the tracks before the driver had a clear view to the left 150-200 feet up the track. (Tr. at 105, 153, 657.)

Donald Cleveland had lived on Rhyne Road, less than one-quarter of a mile from the CSX crossing, for over 20 years. (Tr. at 146.) He testified at trial that the berm beside Rhyne Road and between N.C. 27 and the CSX track made the visibility of a driver "almost nonexistent." (Tr. at 152-53.) He also stated that the obstructions had existed as long as he had lived on Rhyne Road (Tr. at 153), and that he had contacted the railroad several times before the

November 8, 1985 accident concerning the visual obstructions at this crossing. (Tr. at 154-55.)

James W. Cooper, Jr., the conductor of the train, prepared an accident report. (Pl. Ex. 7, Tr. at 222.) This report stated that the view of the track was obscured by topography. (Pl. Ex. 7; Tr. at 228.)

Extra Hazardous Crossing

Two expert witnesses testified at trial that the CSX crossing at Rhyne Road was extra hazardous. One, Dr. Kenneth Heathington, a civil engineer licensed in Illinois, Indiana, Tennessee and Mississippi, has authored over 160 books and articles on transportation and research relating to transportation. He was admitted without objection as an expert in highway engineering and

traffic engineering as these subjects pertain to railroad/highway grade crossings. (Tr. at 295.) Based on his study of the intersection, Dr. Heathington testified:

> There are some crossings because of their design and operation and so forth, that places [sic] a driver at risk, even though you are a reasonable and prudent driver, you have placed your life at risk by using that crossing, because of the deficiencies in that crossing. And that is what would apply to this crossing here, it is an extra hazardous crossing. Any of us in this room would place our lives at extra risk in using that crossing."

(Tr. at 404, l. 11-21.)

Dr. Heathington further testified, "It [the CSX crossing at Rhyne Road] was an extra hazardous crossing at the time of the accident in question...." (Tr. at 395, l. 5-7.)

Dr. Harry Snyder, an engineering professor at Virginia Polytechnical Institute who specializes in human factors research and has thirty years experience in this field, also testified that in his opinion, after visiting the site and analyzing the topography at the intersection,

> [T]he combined geometry, including distances, topography, approach speeds, or typical traffic speeds on Highway 27 and approach speeds of vehicles coming off 27, all that combines to make a very heavy information processing load on the driver, he has to attend to many things at one time as he comes upon that track very quickly upon exciting (sic) Highway 27. In order to maintain good control of his vehicle, and to drive it in a safe fashion, his capacity is simply taken up by that task. And if a train happens to come along at that moment in time when he would otherwise cross the track, and he is not alerted to the existence of that train by an

> adequate external means, that his normal perception reaction time will be inadequate to avoid the collision. That is the accident will take place if those events just happen to occur in time simultaneously.

(Tr. at 510, l. 11-25, at 511, l. 1-2.) He also stated that, in his opinion, the crossing is an extra hazardous crossing. (Tr. at 513.)

Lack of Active Warning Devices

There was testimony to support the jury's finding that defendant CSX negligently failed to install a warning device at the intersection of its track with Rhyne Road. As noted earlier, Donald Cleveland testified that several times before November 8, 1985, he notified CSX of the state of the crossing at Rhyne Road. (Tr. at 154.) He stated, "I was trying to establish

the unsafe crossing, trying to get some guards put up there at that crossing."

(Tr. at 154, l. 6-8.)

Dr. Snyder, from Virginia Polytechnical Institute, stated at trial:

> My opinion is that any mechanism of an active nature that alerts the driver to the positive approach of a train, that is gates, bells, lights, that tells the driver a train is surely coming, will cause him to focus his attention on stopping rather than upon driving his car safely through that intersection and therefore will greatly reduce the likelihood of the occurrence of an accident under these circumstances.

(Tr. at 511, l. 3-17.)

FELA ISSUE #4.--There was sufficient evidence to support an award by the jury of:

(a) $5,000,000.00 to plaintiff Larry Dixon to compensate him adequately and fairly for his mental and physical injuries; and

(b) $8,609,308.00 to plaintiff Larry Dixon to compensate him adequately and fairly for his financial losses.

Award of $5,000,000.00 to Larry Dixon for Mental and Physical Injuries

Dr. Kirkwood Shultz became Mr. Dixon's treating physician in 1988. Dr. Schultz is a specialist in internal medicine and endocrinology. He testified to the extent of Mr. Dixon's injuries and mental attitude.

Dr. Shultz described to the jury Mr. Dixon's physical and mental state in 1988, when he first became Mr. Dixon's physician. He stated that Mr. Dixon was

> a 49-year-old male who arrived with what could be termed a spastic quadriplegic position. He obviously had significant brain damage, though he was able to recognize communication, he was unable to communicate so he had an

expressive aphasia that was total. His only means of communicating were by hand gestures and pressing your hand for a yes or a no during our initial interview. He was not ambulatory. He was unable to feed himself, dress himself, or give himself any care because of his spasticity from his brain injury. He demonstrated both urinary and fecal incontinence at the time of his original examination. He did not have headaches, he was unable to look at objects with a normal gaze pattern, he broke his fusion, so that one eye looking [sic] in one direction and one eye looked in another direction.

He always has a washcloth in his mouth, and his tongue is protruding at all times. He has and has had ulcers in his mouth and on his tounge [sic] because he is unable to effectively control his mouth and control the oral secretions or saliva that issue thereforth [sic]. In an upright position, in 1988, he was able to swallow some semi-solid materials, or some jello, but as far as liquids or real solids, he was not able to handle these for his adequate nutrition. He was

> obviously depressed, was on antidepressant therapy that he had difficulty swallowing, he cried periodically throughout the interview, and during the examination.

(Tr. at 802, l. 15-25, at 803, l. 1-17.)

Dr. Shultz stated that, in his opinion, the problems Mr. Dixon suffered were caused by the train/automobile collision. (Tr. at 804.)

Dr. Shultz testified that Mr. Dixon "lives in a constant state of seizures." (Tr. at 806, l. 18-19.) He also stated that Mr. Dixon "lost his normal blink reflex and now uses artificial tears to guard against corneal abrasions and infections." (Tr. at 807, l. 4-6.)

Dr. Shultz testified that Mr. Dixon is able to raise and lower his right arm, but cannot "use it in any meaning[ful] fashion." (Tr. at 806, l.

3.) He also stated that Mr. Dixon could use his right hand "to some extent. The left hand is for all practical purposes, useless." (Tr. at 807, l. 18-20.)

When asked about Mr. Dixon's fecal and urinal incontinence, Dr. Shultz replied, "He wears a diaper for his bowls [bowels], and he has an in-dwelling Foley catheter for his urinary track [sic]." (Tr. at 805, l. 16-19.)

When asked on direct examination whether Mr. Dixon is able to understand and appreciate his condition, Dr. Shultz responded, "Unfortunately, he can." (Tr. at 804, l. 22.)

Mrs. Sally Dixon, Mr. Dixon's wife, testified that before the accident, Mr. Dixon was an active outdoorsman who often went fishing with his wife and son. (Tr. at 937.) She also testified

the Mr. Dixon "loved to dance." (Tr. at 932, l. 14, at 938, l. 10.)

According to his wife, Mr. Dixon collected antique guns and rifles at flea markets, and he would spend his spare time restoring these guns himself. (Tr. at 937.) He also collected and restored pottery. (Tr. at 937.) He was very handy around the house, and did maintenance work on the house as needed. (Tr. at 935, 937.)

Mr. Dixon is no longer able to do any of these things.

Award of $8,609,308.00 for Financial Losses of Larry Dixon

Dr. Shultz testified at length concerning the nursing care, and its cost, that Mr. Dixon would require for the rest of his life. He stated that Mr. Dixon "probably would have a 15-year

life expectancy, maybe more if he receives ideal medical care." (Tr. at 814, l. 23-25.)

Mr. Dixon is currently on a number of medications including Imipramine, Levason, Ritalin, Epitol, Ibuprofen, Procardia, Zantac, Ducalox and Lasix (Tr. at 813), and it is anticipated these medicines will be required for the remainder of his life. (Tr. at 814.)

Dr. Shultz testified that Mr. Dixon "has had many months of physical therapy and attempts at training him to be self-sufficient both at the Charlotte Rehabilitation Center and elsewhere, and all of these attempts at rehabilitation have failed to make him self-sufficient." (Tr. at 808, l. 8-12.)

Dr. Shultz stated that Mr. Dixon currently requires a "Registered nurse,

minimum of eight hours a day. Licensed practical nurse, the other 16 hours a day, plus a health aide." (Tr. at 812, l. 8-10). Dr. Shultz anticipated that Mr. Dixon's nursing needs will "only get worse." (Tr. at 812, l. 13-14.)

Dr. Shultz opined that Mr. Dixon would be fortunate if, for the remainder of his life, he has less than two hospitalizations a year for pneumonia. (Tr. at 810.) These hospitalizations would probably be of seven to fourteen days duration (Tr. at 810) and would cost probably between $20,000.00 and $30,000.00 per hospitalization. (Tr. at 811.)

Dr. Shultz stated that ancillary equipment devices were needed to assist Larry Dixon in his life and care. These included an electric wheelchair,

hydraulic lifts, special bathing facilities, tub facilities, and special transportation equipment, such as a van adapted to carry a wheelchair. (Tr. at 809.) Mr. Dixon would require all of this equipment for the remainder of his life. (Tr. at 809.)

Dr. J.C. Poindexter, a professor of economics at N.C. State University, testified without objection as an expert witness in economics. He testified that the present value of the lost earning capacity of Mr. Dixon was $625,150.00 (Tr. at 850), not including a loss of the fringe benefits available to Mr. Dixon. (Tr. at 850.) Further, Dr. Poindexter testified that, based on the fringe benefits he knew were available to Mr. Dixon, the cost of the lost fringe benefits would range between

fifteen and twenty-five percent of the wages paid to Mr. Dixon. (Tr. at 850.)

Dr. Poindexter stated that Larry Dixon's past medical expenses, up through January 25, 1991, totaled $767,497.28. (Tr. at 853, l. 18-22.) Dr. Poindexter further testified that to provide nursing care for the next fifteen years, while not assuming that Mr. Dixon actually lives fifteen years but applying the probabilities of dying during that fifteen years to the calculations, the present value of nursing services alone is $4,176,598.00. (Tr. at 857.)

Should Mr. Dixon actually live exactly fifteen years, it was Dr. Poindexter's opinion that Mr. Dixon's nursing costs would be $4,685,155.00. (Tr. at 857.)

Should Mr. Dixon have a normal life expectancy but be subjected to the risk of death between now and the end of his normal life expectancy, nursing care costs, in Dr. Poindexter's opinion, would total $5,926,045.00. (Tr. at 857-58.) If it were certain that he would in fact have a normal twenty-five year life expectancy and actually live twenty-five years, Mr. Dixon's actual nursing care costs alone would be $7,448,774.00. (Tr. at 858, l. 5-8.)

In addition to these expenses for nursing care, Dr. Poindexter testified that the range of acute medical care costs would be between $793,168.00 and $1,414,578.00, depending on how long Larry Dixon lived.

Other estimated costs included costs for pharmaceuticals which range

from $11,614.00 to $20,364.00; for transportation equipment which range from $53,381.00 to $74,638.00; for mobility equipment which range from $33,068.00 to $48,653.00, and for bedroom equipment which range from $19,070.00 to $26,856.00. (Plaintiffs' Ex. No. 28.)

Dr. Poindexter stated that the figures he provided, relative to the losses Mr. Dixon suffered and future costs that will be incurred by him, did not include any compensation for pain and suffering. (Tr. at 881, l. 19-14.)

FELA ISSUE #5.--There was sufficient evidence to support the jury's finding that plaintiff Larry Dixon was <u>not</u> contributorily negligent.

Eyewitness Ralph Cox testified that he did not hear the train whistle, even though his windows were down and the

radio was off, until the train was approximately 200 feet (3 seconds time at 40 miles an hour) from the crossing.

Mr. Cox, the only eyewitness, testified that he did not watch Mr. Dixon the whole time Mr. Dixon approached the crossing, since he was busy negotiating his own crossing. (Tr. at 114.) Therefore, no one presented testimony as to whether Mr. Dixon stopped before he reached the crossing.

Several witnesses, including Mr. Cox, Donald Cleveland, and Michael Brown, all of whom had driven across the CSX crossing on Rhyne Road in the same direction as Mr. Dixon, testified that, because of the topography of the crossing, a car's front bumper had to be

within four or five feet of the tracks before the driver had a clear view to the left 150-200 feet up the track. (Tr. at 105, 153, 657.)

Mr. Cox testified that "I don't believe I could [stop my vehicle from five miles an hour in eight and a half feet]." (Tr. at 97, l. 18-25.)

Mr. Cox was asked: ". . . as an average driver, would you feel comfortable with your car that close [within a few feet, 4 or 5 feet of the track] to the railroad track if a train traveling forty miles an hour was barreling down that track?" (Tr. at 106, l. 3-6.) Mr. Cox answered, "No, sir." (Tr. at 106, l. 7.)

Mr. Cox testified, "I felt Mr. Dixon did not know the train was there until he was right there on the track."

Mr. Cox was then asked, "And was that because he hadn't looked to his left until he was right there at the track?" He replied, "That's mainly because the train whistle had not been sounded until it [the train] was right there at the intersection." (Tr. at 133, l. 18-24.)

FELA ISSUE #6.--Because the jury found plaintiff Larry Dixon's own negligence was <u>not</u> a proximate cause of his injuries, they did <u>not</u> find that any percentage of his injuries was caused by his own negligence.

Since the jury did not find that plaintiff Larry Dixon was contributorily negligent, they were not required to answer this issue.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE COMMON LAW NEGLIGENCE ISSUES IS DENIED.

The defendants' second motion for judgment notwithstanding the verdict challenged the jury's decision on common law negligence issues.

COMMON LAW NEGLIGENCE ISSUES--There was sufficient evidence for the jury to determine the following:

> **COMMON LAW NEGLIGENCE ISSUE #1--The negligence of defendant CSX was a proximate cause of plaintiff Larry Dixon's injuries.**

As discussed supra in FELA Issue #2, there was substantial evidence to support the jury's finding that Larry Dixon was injured as a proximate result of negligence by defendant CSX.

> **COMMON LAW NEGLIGENCE ISSUE #2--Defendant CSX negligently:**
>
> **(a) Failed to blow its train whistle timely, and this was a proximate cause of**

plaintiff Larry Dixon's injuries;

(b) Failed to clear known visual obstructions from its right-of-way, and this was a proximate cause of plaintiff Larry Dixon's injuries;

(c) Maintained the intersection at which this accident occurred in an extra hazardous condition, and this was a proximate cause of plaintiff Larry Dixon's injuries; and

(d) Failed to install an active warning device at the intersection of its track with Rhyne Road, and this was a proximate cause of plaintiff Larry Dixon's injuries.

As discussed supra under FELA Issue #3(a), there was substantial evidence to support the jury's finding that defendant CSX negligently failed to blow its train whistle in a timely manner.

As discussed supra under FELA Issue #3(b), there was substantial evidence to support this finding.

As discussed supra under FELA Issue #3(c), there was substantial evidence to support the jury's finding that the intersection at which this accident occurred was "extra hazardous."

As discussed supra under FELA Issue #3(d), there was substantial evidence to support the jury's finding that defendant CSX negligently failed to install an active warning device at the intersection of its track with Rhyne Road.

COMMON LAW NEGLIGENCE ISSUE #3--There was sufficient evidence to support the jury's finding that plaintiff Larry Dixon was not contributorily negligent.

As discussed supra in FELA Issue #5, there was substantial evidence to support the jury's finding that contributory negligence on Larry Dixon's

part was not a proximate cause of his injury.

COMMON LAW NEGLIGENCE ISSUE #4 --The evidence fully supports the jury's award of $13,609,308 to plaintiff Larry Dixon.

As discussed supra in FELA Issue #4, there was substantial evidence to support the jury's award of $13,609,308.00 in damages for Larry Dixon's personal injuries.

COMMON LAW NEGLIGENCE ISSUE #5--The evidence fully supports the jury's award of $1,500,000 to plaintiff Sally Dixon.

Substantial evidence was presented to the jury to support an award of $1,500,000.00 to plaintiff Sally Dixon for loss of consortium.

Mrs. Dixon testified that, before the accident, she and Mr. Dixon had had an active social life. They "would

always go out evenings, and we went to the auto races, and we just loved to get out and do a lot of things." (Tr. at 932, l. 14-16.)

Mrs. Dixon stated that Mr. Dixon was a family man, and liked to go and do things with his family. (Tr. at 933.) She testified that they had "a wonderful marriage. He was a very considerate husband, and I couldn't have asked for more." (Tr. at 933, l. 9-11.)

Concerning her relationship with Mr. Dixon, Mrs. Dixon testified that he was "very, very affectionate, yes. We never --he never left the house or I never left the house or come [sic] home without a kiss and a hug, and he was just, he was always pinching on me or tickling me or something, hugging me.

He was just, he was very, very affectionate." (Tr. at 940, l. 6-11.)

When asked about their sexual relationship, Mrs. Dixon responded, "We had a wonderful sex relationship. I could, I could not have dreamed that it could be as good as it was. And he was so tender, and so considerate, it couldn't have been more wonderful. It was wonderful." (Tr. at 940, l. 18-21.)

When she was asked if Larry was still capable of giving her love and affection, she responded, "No. I haven't had a hug, a decent kiss, a pinch, a handshake, or any normalcy for almost six years. I miss that. I miss it." (Tr. at 941, l. 3-5.)

Dr. Shultz, the treating physician for Mr. Dixon and for Mrs. Dixon, testified that Mr. Dixon "has been

totally unable to really advance any affection to his wife of any way, shape or form, and he feels that he is a burden." (Tr. at 816, l. 15-18.)

Dr. Shultz also testified:

Q: [I]n your experience as a medical professional, and to a reasonable degree of medical certainty, will Larry --or excuse me, has Larry ever been able since the accident to provide any services of any kind to his wife?

A: No.

Q: Is there a possibility during the remainder of Larry's life that he will ever be able to provide services as such to his wife?

A: No.

Q: Dr. Shultz, . . ., to a degree of medical certainty, based on your treatment of Larry and your experience with his medical history, and based on your experience as a health professional, has Larry been able to offer his wife since the accident, any type of society or companionship in

any sense of that word as it is normally used?

A: No.

(Tr. at 817, l. 15-25, at 818, l. 1-7.)

Dr. Shultz testified that Mr. Dixon probably would not be able to offer his wife any type of society or companionship for the duration of his life. (Tr. at 818.)

Dr. Shultz also stated that, in his medical opinion, and based on his experience as a health professional, there was no possibility that Larry could engage in sexual intercourse or provide any sexual gratification to his wife since the accident, nor be able to throughout the remainder of Mr. Dixon's life. (Tr. at 818.)

Concerning Sally Dixon's psychological state, Dr. Shultz stated,

"There has been a progressive deterioration in Sally Dixon's emotional health, certainly during the last two years." (Tr. at 819, l. 17-19.)

Dr. Shultz went on to state:

> Sally had described on many occasions to me her feeling of hopelessness, and she has tried in every way she could to try to hold the family together. . . .

(Tr. at 820, l. 1-4.)

> [S]he admitted trying to attempt suicide by failing to take care of herself and ultimately her son noticed she was unable to move and take care of herself and she was taken to the hospital, . . . and she has been on antidepressant ever since."

(Tr. at 820, l. 17-23.)

DEFENDANTS' MOTION FOR NEW TRIAL IS DENIED.

Defendants have moved the court for a new trial, pursuant to Rule 59, Fed. R. Civ. P., on grounds listed in their motion under fourteen categories. The motion for a new trial in its entirety is denied. The court will not attempt in this decision to address specifically all of the reasons for denial of this portion of defendants' motion; however, the following states some of the reasons.

A. It was not error to deny defendants' motion to bifurcate the trial, and the defendants were not prejudiced by the admission of evidence allegedly admissible on only one claim.

Defendants request a new trial on all issues on the ground that it was error for the court not to bifurcate the

trial to try, first, the issue whether plaintiff Larry Dixon was an employee of defendant CSX at the time of his injury, and then, depending on the jury's determination of that issue, to try either the FELA claim or the common law negligence claim. Defendants assert that they were prejudiced when the jury heard evidence that defendants assert was admissible on one but not the other of plaintiffs' claims. [Defendants' claim of prejudice arising out of the different measure of damages for the two claims is addressed in section J below.]

Findings of Fact

On February 14, 1991, twenty-seven months after the initial filing of the complaint and four months before the trial, defendants filed a motion to

bifurcate the trial on the ground that it would be difficult to try an FELA claim and a common law negligence claim at the same time. On April 10, 1991, the court entered an order denying defendants' motion to bifurcate the trial.

The FELA claim and the common law negligence claim have a number of common issues, including whether plaintiff Larry Dixon's injuries were proximately caused by the negligence of the defendants, whether his injuries were proximately caused by his own negligence, and the amount of damages he suffered. Separate trials for the two claims would have required the court and the parties to spend considerable time presenting testimony from many of the same witnesses on many of the same

issues in two separate trials. In addition to consideration of the efficient use of judicial resources, separate trials for the two claims would have caused the risk of inconsistent determinations of the common issues of fact. The court reaffirms the decision made in its April 10, 1991 order denying the motion to bifurcate the trial for the reasons stated in that order and above.

Defendants' proposal [to try first the issue whether plaintiff Larry Dixon was an employee of defendants at the time of his injury, and then, depending on the jury's determination of that issue, to try either the FELA claim or the common law negligence claim] would not have eliminated the waste of judicial resources or the danger of

inconsistent determinations of the common issues of fact. If the jury found, as they did at trial, that plaintiff Larry Dixon was an employee of defendant CSX at the time of his injury, defendants proposed that the issues of negligence, contributory negligence and damages be tried only on the FELA claim. This would leave defendants free to assert at the conclusion of the trial (as they now have done and as they did in their initial answer) that the evidence was not sufficient to support a finding that plaintiff was defendants' employee. If defendants are successful in that argument, defendants' proposal would then dictate another complete trial on the common law negligence claim, requiring a second jury to determine for a second time the common

issues of negligence, contributory negligence and damages. Because of the predominance of common issues under the two separate theories, the court was, and still is, of the opinion that trying the case to a single jury, which would be able to decide the factual issues for both claims, was clearly the most efficient means of dealing with the suit and raised little risk of prejudice since the evidence on the claims would almost completely overlap.

Defendants assert in their motion (1) that evidence was presented at the trial which was admissible only on the common law negligence claim and not admissible on the FELA claim and, vice-versa, (2) that some evidence was admissible only on the FELA claim and not on the common law negligence claim.

Defendants' motion does not identify any particular item of evidence that they contend was admissible on one of the claims and not the other. Instead, the motion asserts that broad, general categories of evidence were admissible on one claim and not the other. If counsel for defendants believed that a particular item of evidence offered during the course of the trial was admissible on only one of the claims for relief and not the other, they could have brought the issue to the court's attention by asking for an instruction to the jury that would limit the jury's consideration of that item of evidence to the particular claim on which it was admissible. The court does not recall that any such request for a limiting

instruction was made by defendants' counsel during the course of the trial.

Defendants' motion for a new trial asserts generally that no evidence of plaintiff Sally Dixon's loss of consortium would have been admissible at a separate trial of the FELA claim. In his FELA claim, plaintiff Larry Dixon was entitled to, and did, offer evidence concerning his damages for the medical care and assistance he would need in the future. In this regard, plaintiff Larry Dixon offered evidence of the cost of daily care by nurses and other health practitioners and evidence that plaintiff's wife became his primary care giver after the plaintiff's financial resources had been depleted to the point that he could no longer afford the services provided at a

rehabilitation hospital or by skilled nursing care in his home. (Tr. at 812-813, 854-858, 927-929, 944-948.)

During the course of the trial, defendants took the position that, because plaintiff did not have the assistance of full time nursing care in the past when his care was provided by his family members, he would not need to incur the cost of full time nursing care in the future. (Tr. at 826-829, 889-890, 989-990.) To establish the basis for his claim of need for future professional care so as to overcome defendants' contention, plaintiff Larry Dixon was required to present evidence about his wife's inability to provide the care he would need, in light of her physical and emotional condition. Virtually all of the evidence that

defendants contend was offered on the basis of Sally Dixon's loss of consortium is also admissible to establish Larry Dixon's need for a separate care giver. This would have been the case even if the trials had been bifurcated.

Defendant's motion for a new trial asserts generally that no evidence of plaintiff's twenty years of service as an employee of SWIB would have been admissible at a separate trial of the common law negligence claim. To support his negligence claim, plaintiff Larry Dixon was entitled to, and did offer, evidence of his prior employment as a basis for his claim of damages for lost wages and loss of future earnings. At trial, plaintiff offered evidence on the effect that the dissolution of SWIB in

1986 had on plaintiff's prospects of earning an equivalent income after that dissolution, had it not been for the injuries he suffered. (Tr. at 626-627, 637, 650-651, 655, 879-880.)

At a separate trial of his common law negligence claim, plaintiff Larry Dixon would have been entitled to offer evidence of the relationship between SWIB and the railroad companies to show the likelihood of his continued employability in the railroad industry even after SWIB was dissolved by the railroad companies. Therefore, all of the evidence offered on plaintiff Larry Dixon's damages for loss of future income on his FELA claim would have been admissible at a separate trial of plaintiff Larry Dixon's common law negligence claim.

Conclusions of Law

In deciding whether to bifurcate a trial under Rule 42(b), Fed. R. Civ. P., the trial court must weigh the need for efficient use of judicial resources that can best be served by conducting a single trial against (a) the risk that separate trials will lead to inconsistent verdicts on common issues of fact, and (b) against the danger of prejudice or confusion of the jury, if any, that a single trial might create. The question is a matter that is within the sound discretion of the trial court. T.D.S. v. Shelby Mutual Insurance Co., 760 F.2d 1520 (11th Cir. 1985); Bowie v. Sorrell, 209 F.2d 49, 51 (4th Cir. 1953).

The court considered all of these factors before trial when it denied the

defendants' motion to bifurcate the trial. Defendants' present motion does not identify any particular item of evidence that would clearly have been excluded from one portion of a bifurcated trial and that was prejudicial to the jury's consideration of any one of the issues.

Bifurcation of the trial is not the only means of dealing with the problem of evidence that may be admissible for one party or on one issue in the case but not admissible as to another party or on another issue. In every case, evidence may be offered which is admissible for only a limited purpose. If a particular item of evidence was offered by plaintiffs at trial which defendants thought was admissible on one claim but not the other, defendants had

an obligation to ask the court for a limiting instruction on that evidence pursuant to Rule 105, Fed. R. Evid. When a party fails to make a request for such a limiting instruction, it cannot later claim that it was prejudiced by the admission of evidence relevant to only one of the issues in the case. See Gray v. Bush Entertainment Corp., 886 F.2d 14, 16 (2d Cir. 1989); United States v. Echeverri-Jaramillo, 777 F.2d 933, 936-937 (4th Cir. 1985), cert. denied, 475 U.S. 1031 (1986); Standiewicz v. Beecham, Inc., 687 F.2d 526, 531 (1st Cir. 1982); United States v. Espinoza, 641 F.2d 153, 167 (4th Cir. 1981).

The court reaffirms its decision made before trial denying defendants' motion to bifurcate the trial for the

reasons stated above and in that order, and further denies defendants' first ground for a new trial.

B. Admission of Dr. Kirkwood Shultz's testimony about Mrs. Sally Dixon's mental condition and attempted suicide was not error.

Findings of Fact

Prior to trial, plaintiffs' counsel took a videotaped deposition of Dr. Kirkwood Shultz, the physician who was treating both plaintiffs, to use it at trial in lieu of his live testimony. Prior to trial, plaintiffs edited the videotape of the deposition to take out certain portions to which defendants had objected. When plaintiffs presented the videotaped deposition at trial, counsel for defendants raised a number of objections to the edited tape. Some of these objections concerned portions that

had been deleted in response to defendants' pretrial objections and some objections were to portions that were not deleted from the edited tape. Because defendants failed to bring these objections to the court's attention prior to trial, it became necessary for the court to consider defendants' objections while the jury waited out of the courtroom. (Tr. at 779-786.)

Defendants withdrew their objections to the portions of the deposition that had been deleted by plaintiffs in response to defendants' pretrial objection. With the concurrence of plaintiffs, defendants were allowed to read to the jury the portion of the deposition that had been deleted from the tape prior to trial at their request. (Tr. at 783-786.) The

court sustained defendants' objections to a portion of the deposition that remained on the edited videotape (a portion of an answer appearing on page 26, lines 17 through 19 of the deposition transcript). (Tr. at 792-794.)

The court overruled defendants' objections to that portion of the deposition in which Dr. Shultz was questioned about his opinion of the adverse effects that plaintiff Larry Dixon's injuries had on plaintiff Sally Dixon's mental condition. (Tr. at 786-793.) In this portion of the deposition, Dr. Shultz testified to his opinion that plaintiff Sally Dixon's mental health had deteriorated progressively as the result of her attempting to work and to care for

plaintiff Larry Dixon, to the point of jeopardizing her own health at a time when she was suffering from a deterioration of one of her feet because of diabetes. It was Dr. Shultz's opinion that this culminated in a suicide attempt [through her failure to take care of herself]. (Tr. at 819-820.)

At trial and in their motion for a new trial, defendants objected to the relevancy of this testimony based on their claim that North Carolina law does not permit recovery for mental anguish as part of a claim for loss of consortium. Defendants also objected on the ground that plaintiff Sally Dixon did not plead mental distress as a specific item of special damages.

The court overruled these objections based on the ruling in Mrosla v. Feldman that mental anguish is encompassed within a claim for loss of consortium. Mrosla v. Feldman, 90 N.C. App. 261, 264, 368 S.E.2d 39, 41 (1988). (Tr. at 786-792.) Separate and apart from plaintiff Sally Dixon's claim for loss of consortium, the court notes, as set out more fully in Section A above, that evidence of her poor mental condition was also relevant to defendants' claim that plaintiff Larry Dixon would not need twenty-four hour nursing care in the future.

At trial and in their motion for a new trial, defendants objected to the portion of Dr. Shultz's deposition testimony relating to Sally Dixon's statements to him about her suicide

attempt, on the ground that Dr. Shultz did not have personal knowledge. Defendants claim this is required by Rule 602, Fed. R. Evid. (Tr. at 793-794.) Dr. Shultz testified that Sally Dixon had described to him on many occasions her feelings of hopelessness. He also testified that during her last hospitalization, she admitted to him that she had attempted suicide by failing to take care of herself. (Tr. at 820, l. 1-18.) Giving defendants the benefit of the doubt, this objection may be treated as one made on the ground that the testimony is based on hearsay. This testimony by plaintiff Sally Dixon's personal physician falls within well-established hearsay exceptions.

When defendants objected at trial to Dr. Shultz's testimony relating to

plaintiff Sally Dixon's statements of an attempted suicide, counsel for plaintiff Sally Dixon stated that she would testify about this matter personally at a later point in the trial. Based on this statement, the court overruled defendants' objection on the ground that Dr. Shultz's testimony would corroborate her later testimony. Defendants now assert that the court erred in this ruling, because plaintiff Sally Dixon did not give such testimony later in the trial.

A close reading of the evidence will reveal that apparently Mrs. Dixon admitted her suicide attempt to Dr. Shultz; after that, a psychiatrist concurred that she was suicidal. (Tr. at 820, l. 16-23.)

Counsel for defendants made no request for a limiting instruction at the time that the court ruled that this portion of Dr. Shultz's testimony would be admitted as corroboration of testimony plaintiff Sally Dixon intended to offer later in the trial. More importantly, when plaintiff Sally Dixon completed her testimony without mentioning the suicide attempt, defendants' counsel made no objection or motion to strike the earlier testimony of Dr. Shultz. The failure to elicit testimony from plaintiff Sally Dixon about the suicide attempt may have been a simple oversight on the part of her lawyer. If counsel for defendants had made such a motion at the time of Sally Dixon's testimony, plaintiff would have had the opportunity to offer such

evidence. If it could not be offered, the court would have had the opportunity to strike the prior testimony of Dr. Shultz and instruct the jury to disregard it. Counsel for defendants failed to make such an objection until their motion for a new trial, after it was too late for the opposing party or the court to take any corrective action, if any were necessary.

Finally, defendants claim that it was error for the court to admit this portion of Dr. Shultz's testimony because plaintiff Sally Dixon failed to request a specific instruction to the jury at the close of the case that the jury could award her damages for her mental suffering. This alleged defect does not provide defendants with any additional basis for claiming error in

the admission of Dr. Shultz's testimony. If there was any error in failing to instruct the jury on consideration of plaintiff Sally Dixon's mental distress on the issue of her damages, it was an error in favor of defendants and prejudicial to plaintiff.

Conclusions of Law

Evidence of plaintiff Sally Dixon's mental distress that she suffered as a result of plaintiff Larry Dixon's injuries was relevant to her state law claim of damages for loss of consortium. Mrosla v. Feldman, 90 N.C. App. at 264, 368 S.E.2d at 41.

Separate and apart from the claim of plaintiff Sally Dixon, in light of defendants' claim that plaintiff Larry Dixon's injuries would not require twenty-four hour nursing care in the

future, evidence of Sally Dixon's poor mental condition was relevant to Larry's Dixon's claim for damages.

Dr. Shultz' testimony from medical records of other treating physicians, which were made a part of his business records and were relied upon for making a diagnosis, are admissible pursuant to Rule 803(6), Fed. R. Evid. At trial, defendants made no objection based on whether these records were part of the business records of Dr. Shultz, nor whether he relied on these records to form his medical judgment.

Plaintiff Sally Dixon's statements to Dr. Shultz, her treating physician, about her mental state and suicide attempt fall within two well-established hearsay exceptions. Those are Rule 803(3), Fed. R. Evid. (relating to then

existing mental, emotional or physical condition), and Rule 803(4), Fed. R. Evid. (statements made by a patient to her physician for the purpose of medical diagnosis or treatment). In addition, these statements were competent to explain the basis for Dr. Shultz's opinion that the deterioration of Sally Dixon's mental condition resulted from plaintiff Larry Dixon's injuries under Rule 703, Fed. R. Evid.

Defendants' claims, first made in their motion for a new trial, that the admission of a portion of Dr. Shultz's deposition testimony was error because plaintiff Sally Dixon did not later personally testify as to the suicide attempt and her counsel failed to ask for a specific instruction on damages for emotional distress, come too late.

When a court admits evidence conditionally, based on the assumption that the evidence will become relevant upon proof of another fact later in the trial, the party opposing the admission of such evidence cannot complain about its admission in the absence of a motion to strike when the factual predicate is not subsequently presented. United States v. Dougherty, 895 F.2d 399, 403 (7th Cir. 1990). Indeed, even when evidence is admitted on only one claim or issue, and the court later rules as a matter of law that the claim or issue may not go to the jury, a party may not complain of the admission of the evidence in the absence of a renewed objection and motion to strike. United States v. Morris, 623 F.2d 145, 148 (10th Cir. 1980) (failure to move to

strike evidence offered against one of two defendants after that motion to acquit that defendant was granted); United States v. Beran, 546 F.2d 1316 (8th Cir. 1976) (failure to renew objection and move for mistrial based on evidence admitted on one count after that count had been dismissed); United States v. Moton, 493 F.2d 30, 31 (5th Cir. 1974) (failure to renew objection to evidence admitted on one count after that count had been dismissed).

Based on the above, the court denies defendants' second ground for its motion for a new trial.

C. Admission of evidence that plaintiff Larry Dixon was covered by the Railroad Retirement Act and the Railroad Unemployment Act was not error.

Findings of Fact

At the time of his injuries, plaintiff Larry Dixon was working as a traveling agent for Southern Weighing and Inspection Bureau (SWIB). SWIB was an unincorporated association established and operated by member railroads, including Seaboard Railroad, the corporate predecessor of defendants CSX Railroad.

Under the organizational structure for SWIB, its daily activities were under the direction and control of a general manager who, in turn, was under the direction and control of the chairman of the administrative and executive committees. These committees were made up of one representative, generally the chief traffic officer, from each of the participating

railroads. Over time, the number of railroads involved in SWIB decreased. William McCormack became chairman of these committees when he was appointed as vice president of marketing for Seaboard in 1984. John J. Paylor, the director of pricing services of Chessie/Seaboard, assumed McCormack's duties on these committees in 1985, prior to the date of plaintiff Larry Dixon's injuries.

Michael Brown was employed as a traveling agent for SWIB, the same position held by plaintiff Larry Dixon at the time of Mr. Dixon's accident. He and plaintiff Dixon were the only SWIB employees working out of Charlotte, North Carolina. They reported to supervisors working in SWIB's Atlanta, Georgia, offices.

Ernest Royals was the general manager of SWIB from June 1, 1982, until its dissolution in 1986. He testified at some length about the organizational structure of SWIB and its relationship to and control by the railroad companies. During his direct examination, Mr. Royals was asked if plaintiff Larry Dixon, as an employee of SWIB, was covered by the Railroad Retirement Act. Counsel for defendants objected, stating that "the Railroad Retirement Act specifically covers SWIB employees." (Tr. at 588.) Plaintiff's counsel contended that plaintiff's coverage by this act was some evidence that he was a railroad employee and, therefore, some evidence to support his contention that he was employed by the defendant railroad.

The court concluded that the evidence had some relevance to the plaintiff's claim and overruled the objection. When it made that ruling, the court indicated explicitly that it would deal with the legal import of the evidence at a later time, when the jury was not present.

Mr. Royals then testified that, as a SWIB employee, plaintiff Larry Dixon was covered by the Railroad Retirement Act and the Railroad Unemployment Insurance Act. (Tr. at 588-590.)

Over defendants' objection solely on the grounds of relevance, Michael Brown testified that, as traveling agents for SWIB, he and plaintiff Larry Dixon were covered by the Railroad Retirement Act and not entitled to Social Security benefits. (Tr. at 639-

641.) At the conclusion of the trial, plaintiff offered the defendants' affirmative responses to plaintiffs' request for admissions 6 and 7, which stated that defendants were aware that SWIB employees were covered by Railroad Retirement Act rather than by Social Security and that the funds paid into the Railroad Retirement Act and Railroad Unemployment Insurance for the benefit of plaintiff were paid in part by defendant CSX. (Tr. at 1305.)

Defendants contend in their motion for a new trial that this evidence should not have been admitted because the definition of "employer" in the Railroad Retirement Act and the Railroad Unemployment Security Act, unlike FELA, expressly includes "weighing and inspection bureaus" in addition to a

"carrier by railroad." Despite the court's direct invitation, when the evidence was first presented in Mr. Royals' testimony, to raise the legal significance of this evidence at a later time, counsel for defendants never asked the court to instruct the jury concerning the different definitions of "employer" in these acts.

Evidence of coverage under these two acts was clearly admissible to establish the benefits available to plaintiff through his employment, as part of his lost wage claim.

The evidence relating to plaintiff's coverage under these two acts is not likely to have had any appreciable impact on the jury's consideration of the issue whether plaintiff was an employee of defendants

at the time of his injury. Neither of these statutes was mentioned expressly by either party in closing arguments to the jury. (Tr. at 1306-1400.) If defendants believed during the trial that an explanation to the jury on the differing definitions of employer in the various statutes was important enough to make a difference, counsel for defendants could have and should have asked for a jury instruction on this point.

Conclusions of Law

In Kelley v. Southern Pacific Co., the U.S. Supreme Court adopted criteria in the Restatement of Agency (Second) as the proper framework for determining whether a particular person is an employee of a railroad for purposes of FELA. Kelley v. Southern Pacific Co.,

419 U.S. 318, 324-325 (1974). Among the criteria mentioned in the Restatement is the perception of the public and the belief of the parties as to whether there was a master/servant relationship. Restatement § 220(2)(i). The evidence offered by plaintiff, while not determinative, was relevant to this issue.

Defendants' post-trial protest that the jury failed to understand the significance of coverage under the Railroad Retirement Act and the Railroad Unemployment Security Act because of the definitions of an "employer" in those acts is not well taken. Since counsel for defendants failed to request a jury instruction on this point, they cannot now be heard to complain. Martinez v. Sullivan, 881 F.2d 921, 28 F.R. Evid.

Serv. 921 (10th Cir. 1989). The failure to request a jury instruction is a waiver of any claim of error. Sabin v. Israel, 554 F.Supp. 390, 395 (D. Wisc. 1983).

This testimony was admissible to establish plaintiff's lost wages claim. When evidence is admissible for one purpose but not another, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. Rule 105, Fed. R. Evid. When a party fails to make a request for such a limiting instruction, as is the case here, that party cannot later claim that it was prejudiced by the admission of the evidence relevant to only one of the issues in the case. See United States v. Echeverri - Jaramillo, 777 F.2d 933, 936-937 (4th Cir. 1985), cert.

denied, 475 U.S. 1031 (1986); United States v. Espinoza, 641 F.2d 153, 167 (4th Cir. 1981); Gray v. Bush Entertainment Corp., 886 F.2d 14, 16 (2d Cir. 1989); Standiewicz v. Beechman, Inc., 687 F.2d 526, 531 (1st Cir. 1982).

In closing arguments, both parties focused on the particular evidence relating to the structure and organization of SWIB, the degree to which it was controlled by the railroads including defendant CSX, the extent to which defendants were financially responsible for plaintiff's income and expenses, and plaintiff's particular job assignment on the day of his injuries. Error in admitting evidence at trial is not a basis for a new trial when there is not reasonable likelihood that the evidence affected the outcome of the

jury's determination. Any error arising from a court's decision to admit evidence, notwithstanding its prejudicial effect, is subject to harmless error analysis. Rule 403, Fed. Rules Evid.; U.S. v. Shirley, 884 F.2d 1130, 28 F. R. Evid. Serv. 1054 (1989). The court concludes that there was no error. However, even if the court conceded error, that error would be harmless since it was not reasonably likely to affect the outcome of the jury's deliberations.

Based on the foregoing, the court denies defendants' third ground for a new trial.

D. It was not error to allow witnesses Ernest Royals and Michael Brown to testify that, in their opinion, employees of SWIB were covered by FELA.

Findings of Fact

During the direct examination of Mr. Royals, counsel for plaintiff Larry Dixon posed the following question:

> In 1985, did you have an opinion as the head of Southern Weighing and Inspection Bureau and having had 44 and a half years experience in the railroad industry, as to whether employees or workers for Southern Weighing and Inspection Bureau were subject to or entitled to the benefits under the Federal Employer's Liability Act?

(Tr. at 598, l. 23-25, at 599, l. 1-3.)

After hearing from counsel for both parties at the bench concerning the admissibility of Mr. Royal's answer, the court sustained defendants' objection and did not permit Mr. Royal to answer. (Tr. at 599-600.)

During cross-examination of Mr. Royals, counsel for defendants opened up

the issue by asking questions relating to the coverage of SWIB employees under FELA. In particular, at the end of the cross-examination, Mr. Royals was asked:

Q. Mr. Royals, you worked for SWIB, Southern Weighing and Inspection Bureau, for 38 years, is that right, 1948 to 1986?

A. Yes, sir.

Q. And during that time you never knew of a single SWIB employee to make a claim under the Federal Employer's Liability Act, did you?

A. I wasn't in a position all this time to be aware of this. I didn't know of any after I became on [sic] an officer level. That would have come to my attention.

Q. During the time that you were not an officer, just a regular employee, you never knew of any then, either, did you?

A. No, but I'm not saying that it couldn't have been, I'm saying that I would not have been in

a position to have knowledge of it.

Q. But of the people that you knew that worked with you, you never knew of them to make a claim under the Federal Employer's Liability Act, did you?

MR. SASSER: Objection Your Honor.

THE COURT: Sustained.

(Tr. at 625, l. 15-25.)

After counsel for defendants examined Mr. Royals on this issue during cross-examination, counsel for plaintiff Larry Dixon asked on redirect examination,

As the general manager of SWIB and based on your 44 years of experience in the railroad industry, do you have an opinion as to whether on November 8, 1985, Larry Dixon as an employee of SWIB, was subject to provisions of the Federal -- I'm sorry, Federal Employer's Liability Act?

At this point, the court overruled defendant's objection. (Tr. at 631, l. 16-25, at 632, l. 1-12.) Mr. Royals answered:

> It would be my opinion that Southern Weighing and Inspection Bureau employees being covered or working for employers covered under section 17 of the Interstate Commerce Act, which renders that they are in fact railroad employees, in my opinion, they would be entitled to FELA or whatever else that Southern Seaboard or specific railroad employees are entitled to.

(Tr. at 632, l. 13-19.)

During direct examination, Michael Brown was asked, "During the almost ten years that you worked for SWIB, did you ever form an opinion as to whether you were subject to the provisions of the Federal Employer's Liability Act?" (Tr. at 654, l. 1-4.)

The court overruled defendant's objection to this question based on the prior ruling to the question posed to Mr. Royals on his redirect examination. (Tr. at 654, l. 16-18.)

Mr. Brown answered as follows:

A: In fairness to the question, I don't believe that Larry and I ever got in a debate about it, I know we basically considered ourselves railroad employees.

Q. The issue never arose, is that correct?

A. Not to my knowledge.

Q. In your discussion with Larry?

A. Not to my knowledge.

Q. Had you been injured would you have felt you were subject to the Federal Employer's Liability Act?

MR. GARLITZ: Objection.

THE COURT: Overruled.

A. Yes, sir.

(Tr. at 654, l. 2-25, at 655, l. 1-5.)

During the re-cross examination of Mr. Royals by counsel for defendants, he gave the following testimony:

> Q. Now, during the time that you were general manager of SWIB, you had no experience with the Federal Employer's Liability Act, did you?
>
> A. Correct.

(Tr. at 637, l. 11-14.)

Defendants now contend in their motion for a new trial that this answer shows that Mr. Royals was not competent to give the opinion he earlier expressed on redirect examination. Counsel for defendants did not explore any further Mr. Royals' knowledge that was the basis for his earlier opinion. Defendants failed to make any request that the court strike Mr. Royals' earlier opinion based on this subsequent answer.

On cross-examination by counsel for defendant, Mr. Brown gave the following testimony:

> Q. You testified on direct examination that you believe that as a Southern Weighing and Inspection Bureau employee you were covered by the Federal Employers Liability Act, is that right?
>
> A. I said it was never discussed. I did answer his question that I believe we should be covered.
>
> Q. But you never discussed this with Mr. Dixon?
>
> A. Not to my knowledge.
>
> * * *
>
> Q. What do you know about the Federal Employer's Liability Act?
>
> * * *
>
> A. Basically, I couldn't break it down tell you what it is.

(Tr. at 666, l. 21-25, at 667, l. 1-3, 10-11, at 668, l. 1-2.)

Defendants now contend that this answer shows that Mr. Brown was not competent to give the opinion he earlier

expressed on direct examination. However, counsel for defendants did not explore any further Mr. Brown's knowledge that was the basis for his earlier opinion. They also failed to make any request, based on this subsequent answer, that the court strike Mr. Brown's earlier opinion.

Conclusions of Law

As discussed supra, in Kelley v. Southern Pacific Co., the U.S. Supreme Court adopted criteria in the Restatement of Agency (Second) as the proper framework for determining whether a particular person is an employee of a railroad for purposes of FELA. Kelley v. Southern Pacific Co., 419 U.S. 318, 324-325 (1974). One of the criteria mentioned in the Restatement is the belief of the parties as to whether

there was a master/servant relationship. Restatement § 220(2)(i). The testimony of Mr. Royals and Mr. Brown, while not determinative, was relevant to this issue.

Testimony from Mr. Brown and Mr. Royals was only allowed into evidence after defendants introduced the issue on cross-examination of Mr. Royals about his alleged lack of knowledge of any FELA claim by SWIB employees. Once defendants had opened the door to this issue during cross-examination with evidence favorable to defendants' position, defendants cannot then claim that it was error to allow plaintiff to examine the same issue by subsequent questions. See United States v. Draiman, 784 F.2d 248 (7th Cir. 1986) (cross-examination of government witness

permits admission of bad character evidence, the court noting that counsel takes the risk of opening the door to otherwise inadmissible evidence "when a calculated effort is made to tiptoe over thin ice to gain some evidentiary advantage.")

Based on the above, the court denies defendants' fourth ground for a motion for a new trial.

E. The jury's finding that plaintiff Larry Dixon was covered by FELA was not against the greater weight of the evidence.

Findings of Fact

Defendants argue that the evidence was insufficient to allow the jury to make a finding. The sufficiency of the evidence to support the finding that plaintiff Larry Dixon was an employee of defendants is addressed by the court

above in denying defendants' motions for judgment notwithstanding the verdict.

The court is satisfied that the witnesses who gave evidence in favor of plaintiff on this issue were sufficiently credible to allow a reasonable juror to find their testimony to be truthful and persuasive. The court is convinced that the evidence on this issue was sufficient to allow the jury to make its findings of fact, and these findings are not contrary to the greater weight of the evidence.

Conclusions of Law

On a motion for a new trial based on a claim that the jury's findings are against the greater weight of the evidence, a trial judge has the power to weigh the evidence and consider the credibility of the witnesses. If the

court concludes that the verdict is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice, the court may grant a new trial even when the verdict is supported by substantial evidence. Poynter v. Ratcliff, 874 F.2d 219 (4th Cir. 1989).

From the court's personal consideration of the credibility of the witnesses and the quality of the evidence, the court finds that the jury's verdict is not against the weight of the evidence. 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2806 (1973).

F. Denial of defendants' request for a new trial on the issues of negligence and of contributory negligence for allowing expert opinion

testimony of Dr. Heathington and Dr. Snyder on the extra hazardous nature of the crossing was <u>not</u> error.

Findings of Fact

Dr. Heathington was accepted, without objection by counsel, as an expert in civil engineering, highway engineering, and traffic engineering as it relates to railroad-highway grade crossings and as it relates to human factors. (Tr. at 295.)

Dr. Harry Snyder was accepted by the court without objection as an expert in human factors. (Tr. at 453, l. 22-25.)

Dr. Heathington testified that, in preparation for forming an opinion as to the hazardous nature of the intersection, he personally visited the intersection, collected data from the

U.S. Department of Transportation, and applied this information to known principles of highway safety. He also looked at the vehicular traffic on Rhyne Road (Tr. at 342), the number of trains which traversed both this track and the adjacent track daily (Tr. at 344), the maximum speed of trains using the track (Tr. at 346), speed of vehicular traffic (Tr. at 347), volume of pedestrian traffic (Tr. at 349), the number of accidents at the site (Tr. at 350), the sight distances available to drivers approaching the intersection (Tr. at 351), data on distances a car requires to stop safely without hitting a train once the driver spots the train (Tr. at 357, 358), and personal observations of vehicles going through the intersection. (Tr. at 361.)

Dr. Heathington testified that this crossing was an extra hazardous crossing. He explained this in terms of the use of the crossing by a reasonably prudent driver. He testified in part as follows:

> . . . There are some crossings because of their design and operation and so forth that places [sic] a driver at risk, even though you are a reasonable and prudent driver, you have placed your life at risk by using that crossing, because of the deficiencies in that crossing. And that is what would apply to this crossing here, it is an extrahazardous [sic] crossing."

(Tr. at 404, l. 13-20.) (Emphasis added.)

Dr. Snyder concurred in Dr. Heathington's opinion that the intersection was extra hazardous. (Tr. at 513.) Dr. Snyder did not give the basis of his opinion, as is allowed by

Rule 705, Fed. R. Evid. Defendants failed to move to strike this testimony.

Conclusions of Law

The North Carolina Supreme Court has held, citing as authority 74 CJS Railroad § 727a:

> . . . However, a railroad company ordinarily is not negligent in failing to maintain an automatic alarm, in the absence of a statutory requirement, when the crossing is not more than ordinarily hazardous, as where the view of the crossing is unobstructed. In other words, mechanical warnings ordinarily are required only at crossings so dangerous that prudent motorists cannot use them with safety unless extraordinary protective means are used."

Price v. Seaboard Airline R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

A railroad is under a duty to exercise reasonable care to maintain its crossing over a public highway in a

reasonably safe condition to promote the safe and convenient passage over the crossing by persons exercising ordinary care in their use. Parrish v. Atlantic Coast Line R.R., 221 N.C. 292, 20 S.E.2d 299 (1942). "A railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety..." Godwin v. Atlantic Coast Line R.R., 220 N.C. 281, 17 S.E.2d 137 (1941).

Dr. Heathington's testimony parallels the requirements established by the North Carolina courts. Specifically, Dr. Heathington stated that a person could not use this intersection without being at additional

risk ". . . even though you are a reasonable and prudent driver. . . ." (Tr. at 404, l. 13-20.)

Defendants' complaints that Dr. Heathington's testimony used civil engineering standards are without merit. A civil engineer is properly qualified to give expert testimony concerning the dangers of a specific crossing. Young v. Illinois Central Gulf Ry., 618 F.2d 332 (5th Cir. 1980). See also Hintz v. Jamison, 743 F.2d 535 (7th Cir. 1984) (Civil engineer in car crash case testifying about state's signage requirements).

Testimony from human factors experts such as Dr. Snyder is also relevant and admissible. Relying on other cases, the Fourth Circuit held that a lay jury are not likely to be

able to determine the dangerousness of a railroad crossing without the assistance of expert testimony, including evidence from a human factors expert like Dr. Snyder. Scott v. Sears Roebuck & Co., 789 F.2d 1052 (4th Cir. 1968). See Collins v. Seaboard Coastline R.R., 675 F.2d 1185, 1194-1195 (11th Cir. 1982) (human factors expert testimony admissible).

The arguments by defendants concerning federal preemption are without merit. There is no legislative history to support defendants' position, and there is case law on both sides of the issue. The case law which supports finding no federal preemption is persuasive. Carl v. Burlington Northern Ry., 880 F.2d 68 (8th Cir. 1989); Runkle v. Burlington Northern Ry., 613 Pacific

2d 982 (Montana, 1980); McMinn v. Consolidated Rail Corp., 716 F.Supp. 125 (1989).

Based on the foregoing, the court determines that defendants' sixth ground is without merit.

G. Defendants' request for a new trial on the issues of negligence and contributory negligence based on alleged mistakes in the jury charge on the FELA claim is denied.

Findings of Fact

Defendants' complaint is based on the following portion of the court's charge to the jury on the FELA claim:

> He [Larry Dixon] contends and offers evidence from which you may find that he was driving his car and that he attempted to cross the railroad track and was hit by a train. He testified that he didn't hear or see the train, and that the train visibility, view of the train, was obstructed in part by weeds or some type of growth along the edge of the

> right of way, that he was crossing at a crossing that was a turn off from a road that had a parallel railroad, and that because of the weeds, under brush, whatever the evidence shows, he was prevented from seeing the train until it was too late for him to avoid the collision. He contends that you should find that he was in plain view of the engineer, or the engineer had a better opportunity to see him than he did, and that this was the fault on the part of the defendants in the failing to give warning or a better warning and failing to stop or slow the train down.

(Tr. at 1452, l. 6-22.) (emphasis added by defendants). Defendants assert that the court's reference to testimony of plaintiff Larry Dixon was prejudicial error because Mr. Dixon did not testify, and that reference to the failure to stop or slow the train was prejudicial error because plaintiffs did not contend and did not offer evidence to show

negligence in failing to slow or stop the train. (Defendants' motion for new trial, Section 7, at pp. 20-21.)

The court took corrective action on the very portion of the charge that is now the basis for defendants' motion for a new trial. At the conclusion of the charge, the court instructed the jury not to begin deliberations until after the court had consulted with counsel about any necessary corrections to the instructions. (Tr. at 1478-1479.) In the absence of the jury, defendants' counsel objected to this portion of the charge. Defendants' counsel pointed out that the court's charge suggested that plaintiff Larry Dixon had testified personally that he did not see or hear the train, that his ability to see the train was obstructed, and that plaintiff

was contending negligence by defendants in failing to keep a proper lookout and in failing to slow or stop the train.

Plaintiffs' counsel agreed that the court had referred to testimony by plaintiff Larry Dixon and that plaintiff was not contending negligence in the failure to slow or stop the train. (Tr. at 1481-1483.) At the suggestion of plaintiffs' counsel, (Tr. at 1481-1482), prior to allowing the jury to deliberate on its verdict, the court gave the jury the following corrective instruction on these matters:

> You are the jury in the case, you have heard the assertions by the lawyers, sometimes comments by me which have indicated an understanding at the moment of some fact or contention, but <u>you are not to be guided by what I may have had to say when I was summarizing the contentions of the parties.</u>

It's up to you to determine just what the contentions are, and just what the witnesses said, who said what, and what did it mean.

One error I made in stating contentions was that contention that the railroad was negligent in failing to stop or slow down the train. The plaintiffs have reminded me for the second time that they had no such contention as part of their case. So you will disregard the court's erroneous comments to that effect. Fundamentally, it's your job not mine to remember what the contentions of the parties are and how they bear on your decision. You are the sole judges of the facts, it's your job to determine what was said, what it means, who said it, and it is your job to remember what else took place during the course of the trial.

I think I may one time have misspoke myself and said that Plaintiff had testified. Of course, he didn't testify at all, except by his presence here. And you will disregard that and any other errors I may have made in the trial of the case.

(Tr. at 1487, l. 11-25, at 1488, l. 1-11.) (Emphasis added.)

Defendants did not propose to the court any alternative or additional corrective charge to the jury. When the above-quoted corrective charge was given to the jury, defendants made no objection that the charge was inadequate to correct the inadvertent mistakes in the court's charge. Defendants made no assertion that the inadvertent errors could not be corrected and required the declaration of a mistrial.

The court notes that counsel did eventually make a claim that the inadvertent mistakes in the original portion of the charge were so prejudicial as to require a mistrial. However, this claim of prejudice and motion for mistrial were not made until

after it was clear, from a question by the jury, that the jury's deliberations had passed beyond the issue of negligence and had reached the point of considering how much damages plaintiff should be awarded.

Even in the absence of any correction, the likelihood that defendants would be prejudiced by this portion of the charge is remote. The court, throughout the charge, carefully instructed the jury that it was to be guided solely by its memory of the evidence and not by any comments by the court as to the evidence or the contentions of the parties. Immediately prior to the portion of the charge which is the subject of defendant's motion for a new trial, the court charged the jury:

> Now, I will not undertake to summarize all of the evidence that bears on this question of negligence of one or another party, but I will recall briefly for you some of the circumstances. You had testimony from which or which tends to show <u>what it does show is for you, and by reciting the testimony, I don't mean to testify or tell you what you should find</u>, but I simply repeat a little bit of the testimony to indicate how you would go about looking at the testimony, [sic] <u>how you do find is up to you</u>.

(Tr. at 1451, l. 22-25, at 1452, l. 1-6.) (Emphasis added.) Immediately after the portion of the charge which is the subject of defendant's motion for a new trial, the court charged the jury:

> Now, I am making no effort to capitulate the evidence, but simply to refer to some of the evidence to direct your thoughts towards the evidence. <u>It is for you to remember what it was, what people said</u>, and it is equally important for you to appraise what was said and to form your

> own opinion as to the credibility or lack of credibility of various witnesses who testified about the various features of the collision and the events leading up to it.

Without a specific request, I will, unless otherwise specifically requested, I will not undertake to summarize the evidence on this or any other issue other than by making reference to it and of course instructing you on the law. You will recall all of the evidence that came to you, and based upon your findings of fact, and based on the evidence and reasonable inferences from it, you will answer the second issue which is, was negligence, if any, of defendants CSX, a proximate cause of plaintiff Larry Dixon's injury.

(Tr. at 1452, l. 23-25, at 1453, l. 1-16.) (Emphasis added.)

It was clear to everyone in the courtroom that plaintiff Larry Dixon had been left with no ability to speak as the result of the injuries he suffered in the collision with defendant CSX's train. Even in the absence of any

corrective action by the court, there is no likelihood that the jury would have treated the court's inadvertent reference to testimony directly from plaintiff Larry Dixon as anything other than a slip of the tongue.

The defendants complain that there was a possibility that the jury was misled to believe that plaintiff was contending negligence in the failure to slow or stop the train. Issue 3 on the verdict form and the other portions of the court's charge made it clear that plaintiff's claim of negligence was limited to three specific circumstances: (a) the failure to blow the train whistle at an appropriate time; (b) the failure to clear known visual obstructions at the site of the crossing; and (c) the failure to install

an automatic warning signal at an extra hazardous crossing. (FELA Verdict Issue 3; Tr. at 1457-1460.) In light of the specificity of the verdict form concerning the three circumstances which were the basis for the plaintiffs' claim of negligence by defendant, even in the absence of any corrective action by the court, there is no likelihood that the jury would have treated the court's inadvertent reference to a failure to slow or stop the train as anything other than a slip of the tongue.

Following the corrective instructions, the jury retired to begin its deliberations at 3:40 p.m. on June 18, 1991. (Tr. at 1488.) At 4:45 p.m., the jury returned to the courtroom with two questions which addressed their consideration of the amount of damages.

In particular, the jury asked if the figures on line one of plaintiff's exhibit 28 relating to lost wages were before tax figures from which the jury was to delete the taxes. The jury also asked for an explanation of the difference between the separate columns of figures on that exhibit under the headings of "15 years life expectancy" and "15 years."

In answer to the first question, the jury were instructed that the lost wage figure on the exhibit was the before tax amount. In answer to the second question, a portion of the testimony of Dr. Poindexter, the witness who prepared the exhibit, was reread to the jury. This testimony explained the separate columns of figures on the exhibit. After that testimony was

reread, the jury indicated that it had been given the answer to its question and that it wanted to continue its deliberations the following day. The court excused them until the following morning. (Tr. at 1491-1508.)

The following morning, just prior to the time that the jury retired to continue its deliberations, defendants complained, for the first time, that the court's corrective instruction was not adequate to correct the inadvertent mistakes in the original charge, and moved for a mistrial. Defendants made no request for any further corrective instruction to the jury. The mistrial motion was denied. (Tr. at 1514-1517.)

It is possible that defendants made a tactical choice not to complain about the adequacy of the corrective charge or

to a seek a mistrial before the jury began its deliberations, and only felt the need to seek a mistrial after the jury's questions in the middle of its deliberations made it clear that the jury had apparently resolved the issue of negligence against defendants, and was in the midst of determining the amount of damages to award to plaintiff.

Conclusions of Law

The determination whether an inadvertent error in instructions to the jury is prejudicial to a party must be made by an examination of the error in the context of the charge as a whole. Delancey v. Moticheck Towing Services, Inc., 427 F.2d 897, 901 (5th Cir. 1970). A minor error in the instructions to the jury is not sufficient to require a new trial. U.S. v. Pumphrey, 831 F.2d 307

(D.C. Cir., 1987), Pope v. Illinois, _____ U.S. _____, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). When, as here, it is apparent from the overall context of the trial that ample evidence was introduced on Larry Dixon's inability to speak, and the court made an inadvertent slip of the tongue in its instructions to the jury, a court can fairly assume that the curative instructions met their purpose and the jury were able to base their decision on the evidence actually heard and the specific issues presented on the verdict form. That is particularly the case when the court's instructions to the jury direct the members to rely on their own recollection of the evidence.

When, as here, a specific curative instruction is given, the court must

gauge the probable effect on the jury's ability to judge the evidence fairly, and, unless the contrary is shown, may assume that the jury rendered their verdict in accordance with the corrective instructions. Girardin v. Pile, 352 F.Supp. 979, 31 Fed. R. Evid. Ser. 1463 (D. Colo. 1990). When the court has made an error in the jury instructions, it is the obligation of counsel for a party to call the error to the court's attention before the jury begins to deliberate. The failure of counsel to complain about the adequacy of a corrective charge before the jury begins their deliberations is evidence that counsel was satisfied, at that time, that the corrective charge was adequate to cure the mistake and constitutes a waiver of the right.

Martinez v. Sullivan, 881 F.2d 921, 28 Fed. R. Evid. Serv. 92 (10th Cir. 1989). A later objection, made only after the outcome of the jury's deliberation becomes apparent, comes too late. Id.

Accordingly, the inadvertent mistake which is the subject of defendant's motion for a new trial on the issues of negligence and contributory negligence is not the kind of error that is sufficiently prejudicial to require a new trial. The error was sufficiently corrected by the court's curative instruction prior to deliberation. The failure of defendants to complain about the adequacy of the curative instruction until after the jury had indicated that they had determined the issue of negligence against defendants operates as a waiver

by defendants of the claimed error in the instructions.

Based on the foregoing, the court denies defendants' seventh ground for a new trial.

H. The jury's finding that plaintiff Larry Dixon was not contributorily negligent is not against the greater weight of the evidence.

Findings of Fact

Defendants argue that the evidence was insufficient to allow the jury to make such a finding. The sufficiency of the evidence to support the finding that plaintiff Larry Dixon's injuries were not proximately caused by his negligence are addressed by the court supra under FELA Issue #5 and Common Law Issue #4 in denying defendant's motions for judgment notwithstanding the verdict.

The court is satisfied that the witnesses who gave evidence in favor of plaintiff on these issues were sufficiently credible to allow a reasonable juror to find their testimony to be truthful and persuasive. The court is convinced that the evidence on these issues was sufficient to allow the jury to make their findings of fact and it does not determine that these findings are contrary to the greater weight of the evidence.

Conclusions of Law

On a motion for a new trial based on a claim that the jury's findings are against the greater weight of the evidence, a trial judge must weigh the evidence and consider the credibility of the witnesses. If the court concludes that the verdict is against the clear

weight of the evidence, is based on false evidence, or will result in a miscarriage of justice, the court may grant a new trial even when the verdict is supported by substantial evidence. Poynter v. Ratcliff, 874 F.2d 219 (4th Cir. 1989).

From the court's observation of the witnesses and its consideration of the credibility of the witnesses and the quality of the evidence, the court finds that the jury's verdict is not against the clear weight of the evidence. 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2806 (1973).

I. It was not error to allow Dr. Harry Snyder to testify about the results of his survey of how other motorists acted in approaching the crossing.

Findings of Fact

Dr. Harry Snyder was received as an expert in the field of human factors without objection by the defendants (Tr. at 453.) He had been hired by the plaintiffs to analyze the accident from a human factors engineering perspective, and to determine what causes of the accident, if any, could be identified. (Tr. at 504.) Dr. Snyder testified that, in his analysis of the accident, he considered the speed of the train, the angle of the sun, the speed of traffic on both N.C. 27 and Rhyne Road, the angle of the intersection of the two roads, the size of N.C. 27 in relation to Rhyne Road, the number of railroad tracks at the intersection, Mr. Dixon's experience with the intersection, Mr. Dixon's experience as a railroad

employee, and known perception reaction times as established in the field of human factors.

Based on his analysis he was asked by plaintiffs the following:

Q: Dr. Snyder, do you have an opinion based on your knowledge of human factors as an expert in that field, based on the knowledge that you have of this intersection, the speed of the train, the speed of the vehicles operating on N.C. 27 and their speed as they turn onto Rhyne Road and the known established perception reaction time from civil engineering as to what difference, if any, it would have made had the train whistle been blown at the whistlepost approximately 1,500 feet from the intersection.

MR. GARLITZ: Objection.

THE COURT: I believe that is a fair question. Objection is overruled.

A: Yes, sir, I have an opinion.

Q: What is that opinion?

A: Had the whistle been blown as it should have been at 1,500 feet and intermittently and then continuously all the way across the crossing, then Mr. Cox would have been able, Mr. Dixon would have heard that whistle at a greater distance than he did, and would have had adequate reaction time, perception reaction time to avoid the accident.

(Tr. at 497, l. 24-25, at 498, l. 1-21.)

Dr. Snyder further testified as to his opinion as follows:

Q: Dr. Snyder, let me ask the question again Concerning the train engineer. Tell me what opinion, if any, you have as an expert in human factors as to the effect of the train whistle, if the evidence establishes that it was not

blown at the whistlepost, upon this accident, what effect, if any?

MR. GARLITZ: Ask and answer.

Q: You objected --

MR. GARLITZ: You overruled the objection and the man gave it.

THE COURT: The objection is overruled.

THE WITNESS: It is in my opinion that if the whistle were not blown at the whistlepost, and in a conventional fashion of two longs, a short and a long, or something very similar to that, because there are variations among engineers on that, that contributed directly to the existence of this accident.

(Tr. at 506, l. 7-23.)

Ultimately, counsel for plaintiff asked Dr. Snyder the following:

MR. BROWN: Do you have an opinion based on your examination of this intersection as to its degree of hazardousness to drivers utilizing this intersection?

* * *

THE WITNESS: My opinion is this is an extrahazardous [sic] crossing.

(Tr. at 512, l. 19-22, at 513, l. 6-7.)

In their motion, defendants suggest that Dr. Snyder's testimony concerning the usage of the intersection was provided for the sole purpose of establishing what a reasonably prudent driver does. The testimony of Dr. Snyder is totally devoid of any reference to what a reasonably prudent driver does at this intersection. From Dr. Snyder's testimony, it appears that the traffic study was only one factor in his examination of the intersection and

was not proffered by him to establish what a reasonably prudent driver would do at the intersection.

The court notes that it specifically instructed the jury during Dr. Snyder's testimony that it was up to the jury to determine the weight and significance of his testimony. (Tr. at 490-91.)

With respect to the issue of reasonably prudent persons, the court in its charge stated in part:

> Ordinary care, I think I have said, is the care which reasonably prudent persons exercise in the management of their own affairs in order to avoid injury to themselves or their property, or to the person or property of others. It is not an absolute term but a relative term, that is to say, in deciding whether ordinary care was exercised, the conduct in question must be viewed in a light of all surrounding circumstances as

> shown by the evidence in that case. Because the amount of care exercised by a reasonably prudent person varies in proportion to the dangers known to be involved in what is being done, it follows that the amount of caution required in the use of ordinary care will vary within the nature of what is being done and all the surrounding circumstances shown by the evidence in the case.

(Tr. at 1456, l. 3-18.)

The defendants made no objection to the above charge, and they requested no specific instruction. In addition, they made no objection nor any specific request for instructions concerning arguments made by plaintiffs' counsel.

Conclusions of Law

The North Carolina Supreme Court has held, "It is for the jury to say whether the crossing in question was, under all the circumstances, peculiarly

and unusually hazardous so as to require the railroad in the exercise of due care to erect gates or signal devices. . ." Caldwell v. Southern Ry., 218 N.C. 63, 70, 10 S.E.2d 680, 688 (1940) (emphasis added).

The trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. State v. King, 287 N.C. 645, 658, 215 S.E.2d 540, 548-49 (1975), death sentence vacated, 428 U.S. 903, 96 S.Ct. 3208, 49 L.Ed.2d 1209 (1976).

Testimony about human behavior has been approved by the North Carolina courts. In Robinson v. Seaboard System R.R., the court allowed testimony from a psychologist received as an expert in the field of human behavior. Robinson

v. Seaboard System R.R., 87 N.C. App. 512, 361 S.E.2d 909 (1987). Similarly, traffic studies and perception reaction times such as those described by Dr. Snyder have been accepted by the North Carolina courts. Van Camp v. Burgner, 299 N.C. App. 102, 392 S.E.2d 453 (1990).

In conclusion, the court does not find that Dr. Snyder used his traffic study to define what a reasonable and prudent driver would do at the intersection. This question was not asked by counsel for plaintiff nor did Dr. Snyder ever proffer his traffic study as a mechanism to define what a reasonable and prudent driver would do at the intersection.

Based on the foregoing, the court finds defendants' ninth ground to be without merit.

J. The award of damages to plaintiff Larry Dixon was supported by the evidence and the jury did not disregard the court's instructions concerning the determination of damages.

Findings of Fact

In its verdict on the FELA claim, the jury found that plaintiff Larry Dixon was entitled to damages of $8,609,308.00 for his financial needs and $5,000,000.00 for his mental and physical injuries.

Dr. Poindexter, plaintiff's expert economist, testified to four separate figures from which the jury could gain insight into the economic loss suffered by Mr. Dixon. Dr. Poindexter testified that should Mr. Dixon be exposed to

risk, that is, not be guaranteed of reaching the life expectancy of fifteen years, the present value of his losses totaled $6,494,471.00. (Tr. at 876.) Further, he explained that in the event this figure was awarded by the jury and Mr. Dixon in fact lived 15 years, the moneys would run out before his actual death. (Tr. at 877.) Dr. Poindexter further testified that should Mr. Dixon live exactly 15 years, the present value of the amount of money needed would be $7,113,206.00. (Tr. at 877-78.) Should Mr. Dixon have a normal life expectancy but be exposed to the risk of dying (that is, he would not be guaranteed a normal life expectancy since half the people in the general population have a less than normal life expectancy and the other half live longer than a normal

life expectancy), the present value of his needs would be $8,609,308.00. (Tr. at 877.) Should Mr. Dixon live exactly 24 years, that is, the average of all life expectancies in the general population, the present value of his needs would be $10,454,796.00. (Tr. at 877.) Thus, the jury was given a range of present values of the financial losses suffered by Mr. Dixon from $6,494,471.00 to $10,454,796.00.

The defendants offered no evidence concerning financial losses suffered by Mr. Dixon.

In the above context, the jury were provided four different figures ranging from a figure that would not provide sufficient income, should he in fact live 15 years, to a figure that would

provide only enough income if he lived exactly 24 years.

Dr. Kirkwood Shultz testified that Larry Dixon had a "fifteen year life expectancy, maybe more if he received ideal medical care." (Tr. at 814, l. 24-25.)

Dr. Shultz further described ideal medical care as requiring a skilled nursing facility (Tr. at 811, l. 13-14). However, he questioned

> whether there are many skilled nursing facilities that have the capacity of taking care of somebody as complicated as Mr. Dixon. It requires a head trauma team because he is unable to communicate effectively any of his needs. It requires a team that understands the feeding tube situation to avoid aspiration, positioning the patient properly, so that it is a full-time [sic] twenty-four-hour day seven day a week job.

(Tr. at 811, l. 14-22.)

When asked about the level of nursing care required should Mr. Dixon stay at home, Dr. Shultz testified:

A: It would require probably a skilled nurse for one or two shifts and a licensed practical nurse for one shift. Plus a health care aide to assist in the bathing and hygienic care.

Q: How many hours a day would the licensed practical nurse be appropriate versus the number of hours required for the RN or registered nurse?

A: Registered nurse, a minimum of 8 hours a day. Licensed practical nurse, the other 16 hours a day, plus a health aide.

Q: Do you have an opinion as to whether his nursing needs will change in the future?

A: I would anticipate they will only get worse. He will need more care.

(Tr. at 812, l. 1-14.)

Dr. Poindexter testified, without objection from the defendants, that the figures he used were "very conservative." (Tr. at 881, l. 15.) He stated that the dollar values he used were in 1986 dollars, the date of injury, as distinguished from 1991 dollars, the date of trial. He further testified that, should he have taken into account the changes in the value of money in this time frame, it would have increased his total calculation by approximately twenty-five percent. (Tr. at 881.)

The values provided to the jury by Dr. Poindexter concerning lost wages did not include the employer's contribution to fringe benefits. Dr. Poindexter testified, without objection, that the fringe benefits component of Mr. Dixon's

lost wages would have a value of fifteen percent to twenty-five percent of the total lost wages. (Tr. at 849, 850.)

In spite of Dr. Shultz's testimony that Larry Dixon would need a health aide in addition to nurses (Tr. at 812), Dr. Poindexter did not include the cost of such a nurse's aide in his figures. (Tr. at 889.)

On cross-examination, Dr. Poindexter testified that if the current yield on treasury bills and current inflation rates are used, as distinguished from historical averages, the effect on his calculations would be "virtually none." (Tr. at 885, l. 22.) Further, on cross-examination, Dr. Poindexter testified that by using a post-tax figure for lost earnings, the figures supplied to the jury on direct

examination would be reduced by between fifteen to eighteen percent. (Tr. at 888.)

On cross-examination, Dr. Poindexter further testified that if the jury should find that Mr. Dixon could not use an electric wheelchair, despite the testimony from plaintiff's wife of his ability to use a channel tuner for a TV, the jury should reduce the total figures by $25,000.00. (Tr. at 890-91.)

Concerning the mechanisms he used to make his calculations, Dr. Poindexter testified that he previously had been retained by Seaboard (the corporate predecessor of the defendants in this matter) in another matter and had employed the identical analysis to which there had been no complaint by the lawyers from Seaboard. (Tr. at 893-94.)

Defendants complain that the jury verdicts are inconsistent because the amounts awarded in both the FELA and the state tort claim action were identical. Neither the court nor the attorneys in this case have any knowledge of how the jury reached its conclusions concerning damages. However, it is readily apparent that a range of figures was given by the plaintiff and that defendants presented no evidence concerning alternative figures. It is assumed that the jury considered Dr. Poindexter's testimony concerning the effect of taxes on the wage claim, the absence of calculations concerning loss of fringe benefits, the absence of calculations concerning the uncontradicted testimony of the need of an additional nurse's aide for 16 hours

a day for the remainder of Mr. Dixon's life, and the utilization of 1986 figures instead of 1991 figures which would have increased the overall calculations by twenty-five percent.

Taking into consideration the variables presented to the jury, it would appear to the court that the jury assumed, based on Dr. Shultz's testimony, that Mr. Dixon would live 15 years and, if provided excellent medical care as outlined in Dr. Shultz's testimony, could live longer. The jury apparently accepted a compromise figure between the number provided by the economist, which would cause all moneys to run out on the fifteenth anniversary, and the figure provided by the economist should Mr. Dixon live exactly 24 years. The figure provided is between these two

figures. This appears appropriate to the court based on the evidence presented by Dr. Shultz and Dr. Poindexter.

One of the items mentioned in Dr. Poindexter's testimony was the cost of a van that could be used to transport a person like plaintiff, who must use a wheelchair. There was evidence to support a finding that a special kind of vehicle would be needed to transport plaintiff. Defendants do not appear to contend that the evidence was insufficient to show the need for such a van. Defendants do not appear to contend that, as a matter of law, plaintiff's claim for damages could not include the cost of such a van. Defendants' claim appears to be that the absence of any specific instruction to

the jury that they could consider "transportation costs" required the jury to allow no damages for the cost of such a van. The jury was instructed that it was to award damages based on "expenses of all kinds which you find to have been necessarily incurred as a reasonable result of the wrongful acts of the defendant." (Tr. at 1470, l. 21-23.)

The court finds it important to note that defendants now complain of alleged confusion concerning the calculation of damages relating to the common law verdict, yet defendants elected to waive their argument to the jury relating to the common law cause of action. (Tr. at 1565, l. 2-8, at 1567, l. 19-21.) Had defendants believed that there was a probability of confusion preceding the rendering of the verdict,

they had an opportunity at the end of the evidence to present orally to the jury the differences in what they contend to be the measure of damages. However, they elected not to do so.

Conclusions of Law

Rule 49(b) of the Fed. R. of Civ. P. requires that where trial counsel feels the verdict to be inconsistent and fails to object to any asserted inconsistencies and does not move for resubmission of the inconsistent verdict before the discharge, the party's right to seek a new trial is waived. White v. Celotex Corp., 878 F.2d 144, 146 (4th Cir.), cert. denied, _____ U.S. _____, 110 S.Ct. 406, 107 L.Ed.2d 732 (1989); Ludwig v. Marion Laboratories, Inc., 465 F.2d 114, 118 (8th Cir. 1972). The purpose of this

rule is to allow the original jury to eliminate any inconsistencies without the need to present the evidence to a new jury. White, 878 F.2d at 146; Skillin v. Kimball, 643 F.2d 19, 20 (1st Cir. 1981). This prevents a dissatisfied party from misusing the procedural rules and obtaining a new trial for an asserted inconsistent verdict. In the case at bar, counsel for defendants made no motion and raised no issue concerning alleged inconsistencies after the jury rendered its verdict on the common law claim.

Based on the foregoing, the court denies defendants' tenth ground for a new trial.

K. The defendants' request for a new trial on the issues of damages is denied, because the damages awarded by the jury are not excessive and are

not against the clear weight of the evidence.

Findings of Fact

Extensive evidence is recited in Section J supra outlining the evidence presented by plaintiffs to justify the damage award for Larry Dixon's financial needs.

With respect to the moneys awarded for pain and suffering, Dr. Kirkwood Shultz testified that Mr. Dixon is able to understand and appreciate his condition (Tr. at 804); that he lives in an almost constant state of seizures (Tr. at 806); that he currently takes an antidepressant (Tr. at 813); and that he suffers from depression. (Tr. at 816.)

Dr. Shultz testified:

Q: Dr. Shultz, based on your examination of Mr. Dixon and your knowledge of him, can you describe to us what evidence,

if any, you have seen that Mr. Dixon suffers depression?

A: Well, from the first time he was seen, he was crying. When you tried to ask him questions, you could obviously see that he was aware of his clinical situation, he was embarrassed about his inability to control his urinary track [sic] and his bowl [sic] function, and all of these things. He saw his son literally grown up in front of him and was unable to participate in any activity with his son. He has been totally unable to really advance any affection to his wife in any way, shape or form, and he feels he is a burden.

Q: What method, if any, has he used to demonstrate how he feels about his situation as it relates to his family?

A: Cries and shakes his head.

(Tr. at 816, l. 4-22.)

Dr. Shultz further testified about Mr. Dixon's overall condition. Mr. Dixon suffers expressive aphasia; he can

hear communication from other people but has no way of expressing to other people his ability to recognize what has been said or his understanding of what has been said. (Tr. at 804.) He can understand what is said to him and is able to appreciate his condition. (Tr. at 804.) Mr. Dixon is unable to walk because he has a bulbar-type palsy and appears as if he has a severe case of Parkinson's disease. (Tr. at 804-05.) Mr. Dixon suffers urinary incontinence (no bladder control) and fecal incontinence (no control over his bowels). (Tr. at 805.) He wears a diaper for his bowels and has an in-dwelling catheter for his urinary tract. (Tr. at 805.) He is able to raise his right arm from beside his body to his head but he cannot use it purposely to

take anything out of or put anything into his mouth. He cannot use the arm in any meaningful fashion. (Tr. at 805-06.) He has lost the ability to grip his hands purposely. (Tr. at 807.)

Since March of 1988, Mr. Dixon has been admitted to the hospital for aspiration pneumonia related to his inability to swallow. He has ultimately had to have a tube placed in his abdomen for the purposes of feeding. (Tr. at 806.) He has lost his normal blink reflex and now must use artificial tears to guard against corneal abrasions and infections. (Tr. at 807.)

In addition to the above testimony, counsel for defendants, in their final argument to the jury, described on three separate occasions plaintiff's injuries in terms that would certainly support

the jury's conclusion that a substantial recovery was justified.

Counsel for defendants stated, "Mr. Dixon has horrible damages. I said and I still say, I don't think I have ever seen a case of worse damages by anyone who survived any kind of accident. The damages are there." (Tr. at 1316, l. 13-16.)

Later, defendants' counsel, in discussing what the injury had done to the family, described the condition as an "absolutely tragic situation." (Tr. at 1317, l. 21.)

Counsel for defendants also told the jury that the damages were every bit as bad as the family had complained of. He said, "Let me talk a little bit about the damages, which are absolutely awful. I think the film and the testimony that

we heard of this tragic experience that this family has gone through since this happened almost six years ago, is equally as bad as they say." (Tr. at 1318, l. 5-9.)

The court does not disagree with counsel for defendants' assessment concerning the magnitude of the damages in this case. If plaintiff is entitled to recover, the evidence as noted amply demonstrates the justification for a substantial recovery.

Conclusions of Law

The district court has some discretion in ruling on a new trial motion pursuant to Fed. R. Civ. P. 59. Taylor v. Home Insurance Co., 77 F.2d 849 (4th Cir. 1985), cert. denied, _____ U.S. _____, 106 S.Ct. 2249, 90 L.Ed.2d 695 (1986). The U.S. Supreme Court, in

Grunenthal v. Long Island R.R., found that where the trial court had indulged in a "fairly accurate estimate of factors to which the jury gave attention, and favorable response, in order to arrive at the verdict announced, "it would be error to reverse the holding of the jury relative to damages." Grunenthal v. Long Island R.R., 393 U.S. 156, 89 S.Ct. 331, 333, 21 L.Ed.2d 309, 311 (1968).

The Supreme Court paid particular attention to the uncontradicted evidence of damages produced at trial by plaintiff. Id. It concluded that the trial court was correct in determining that a jury could, from the uncontroverted evidence, render such a verdict. Id.

Plaintiff's damages, as presented in this case, were uncontradicted. Defendants offered no evidence to refute the testimony of plaintiffs' physician or of the economist. Further, in their final arguments to the jury, counsel for defendants conceded that the damages were as bad as had been presented by plaintiffs.

Based on the foregoing, the court denies defendants' eleventh ground for a new trial.

L. The defendants' request for a new trial on the damages issues is denied because the award is <u>not</u> against the greater weight of the evidence.

Findings of Fact

Defendants argue that the evidence was insufficient to allow the jury to make such findings to award damages.

Defendant's claims relating to the sufficiency of the evidence to support the findings of damages are addressed above in this denial of defendants' motions for judgment notwithstanding the verdict, as well as section J, supra. The court is satisfied that the witnesses who gave evidence in favor of plaintiffs on these issue were sufficiently credible to allow a reasonable juror to find their testimony to be truthful and persuasive. The court is convinced that the evidence on these issues was sufficient to allow the jury to make its findings of fact and it does not find that these findings are at all contrary to the greater weight of the evidence.

Conclusions of Law

On a motion for a new trial based on a claim that the jury's findings are against the greater weight of the evidence, a trial judge has the duty to weigh the evidence and consider the credibility of the witnesses. If the court concludes that the verdict is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice, the court may grant a new trial even when the verdict is supported by substantial evidence. Poynter v. Ratcliff, 874 F.2d 219 (4th Cir. 1989).

From the court's personal consideration of the credibility of the witnesses and the quality of the evidence, the court finds that the

jury's verdict is not against the clear weight of the evidence, but is thoroughly consistent with that evidence. 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2806 (1973).

M. Allowing the jury to determine the plaintiffs' common law negligence after claim it had returned a verdict that plaintiff Larry Dixon was an employee covered by FELA was not error.

Findings of Fact

This suit was filed on November 7, 1988. The allegations of liability under FELA and common law were contained in the initial complaint.

The case was initially calendared for trial on February 5, 1990, then again during the month of October, 1990, and for a third time during February of 1991. The court entered a pretrial

order on January 26, 1989, which, among other things, required that no motions be filed later than the day the Clerk of Court mailed trial calendars on which the case appeared or any other notice setting the case for trial. It specifically stated that "no motions will be considered after that date except by leave of court."

In spite of the fact that these issues were raised in the initial complaint in November of 1988, that this case had been calendared two prior times, and that the pretrial order was entered over one year preceding the date defendants filed the motion to bifurcate, defendants nevertheless filed a motion to bifurcate on February 14, 1991.

In defendants' answer to plaintiffs' initial complaint, defendants contended that plaintiff Larry Dixon was not an employee of the railroad and, therefore, a cause of action does not lie under FELA. In the event such a cause of action does not lie under the Federal Employers' Liability Act, the only action available to plaintiff Larry Dixon is under North Carolina common law.

Plaintiff Larry Dixon filed the complaint in the alternative alleging, first, employment by the railroad and, therefore, coverage under FELA, or in the alternative, should employment not be found, liability under state common law. The court finds this to be an appropriate form of pleading.

Due to the defendants' denial that plaintiff Larry Dixon was employed with the railroad, the court concluded that both issues should be submitted to the jury, to preclude the necessity of retrial in the event of a subsequent appellate court reversal on the FELA issue in the event employment was found by the jury. These issues were discussed in great detail in bench conferences and in open court, in the absence of the jury, with counsel for both parties. It was mutually agreed and understood that the parties would submit the employment issue and the FELA tort claim action to the jury first and, in the event the jury found no contributory negligence under this theory of action, the court would then reinstruct the jury under state common

law and submit the common law tort action to them for disposition.

After hearing all of the evidence, the court finds that, with the exception of brief testimony concerning the loss of consortium claim of the spouse and the evidence relating directly to the employment structure of the Southern Weighing and Inspection Bureau, substantially all of the evidence submitted would have been relevant in both causes of action.

Further, the court finds that this was a lengthy trial requiring a substantial commitment of court resources for a period of eleven full days, including one weekend and a day of jury selection. The court believes that judicial economy was served by trying both actions at the same time.

After the jury came back and found no contributory negligence in the FELA action, counsel for defendants then indicated that they had not agreed to the procedure above described. This was not the recollection of the court. After the jury returned its verdict in the FELA action and found no contributory negligence, the court then instructed the jury on the common law action. A verdict was then returned in favor of plaintiff and again no contributory negligence was found.

The court observed the jury over a period of eight days of courtroom testimony and jury deliberation, and at no time observed any appearance of confusion, bewilderment or any other indication that they did not fully understand and appreciate the nature of

the two separate causes of action pursued by plaintiffs. At no time did the jury question the court concerning the procedure used.

The only question from the jury related to whether a figure given to them by the economist was a pre-tax or an after-tax figure. This question came after the charge under FELA in which the court instructed the jury that after-tax dollars should be used in their calculations. The court finds that to have asked this question, the jury must have been intelligent, informed, attentive to the instructions and the evidence and to the responsibility placed upon them. It appears to the court from this question that the jury were aware of the differences in calculation of damages under FELA and

under common law negligence. Although identical figures were rendered in both causes of action, this is entirely understandable in that the wages shown by the evidence did not include the value of lost fringe benefits (estimated to be twenty-five percent of plaintiff's wages) and that if taxes were deducted from the figure provided, it would only have reduced the wages from fifteen to eighteen percent of the total. From this, the court could conclude that the jury assumed these figures would offset each other. Further, there were other variables presented by Dr. Poindexter, plaintiffs' expert, that were available to the jury in rendering its decision. Some of these variables are discussed in Section J above.

A further justification for not bifurcating this trial concerns the real probability of separate conflicting verdicts from two separate juries. The evidence would have been repetitive in a second trial; conflicting verdicts might have been obtained. Obviously, this would not have served either party's interest and would have further complicated and lengthened the conflict.

Conclusions of Law

The cases relied on by defendants do not support their position. Each of the cases deals with either a question of clarification of a verdict or an inconsistent verdict.

In this case, the verdicts are not inconsistent because, as all parties agree, the FELA action is the exclusive remedy of plaintiff, and only in the

event of a reversal of the FELA action would the common law action be binding upon defendants herein. There can be no prejudice to defendants under such circumstances.

Common law liability issues have been tried along with FELA issues in other cases without objection by either party and without confusing results. See Swab v. Erie Lackawanna R.R., 438 F.2d 62 (3rd Cir. 1971); Lockhard v. Missouri Pacific R.R., 894 F.2d 299 (8th Cir. 1990); Brophy v. Consolidated Rail Corp. v. Port Authority of New York, 1986 W.L. 11686 (E.D. Pa. 1986).

The manner in which this case was tried did not extend or abridge the rights of the parties under FELA or the rights of the defendants to defend the common law action in an aggressive and

vigorous manner. The court finds no prejudice.

Based on the foregoing, the court denies defendants' thirteenth ground for a new trial.

N. The cumulative effect of all of the claims of error did not deprive defendants of a fair trial.

The court finds no errors, separate or cumulative, which are sufficient to support the defendants' claims for a new trial.

Based on the foregoing, the court denies defendants' fourteenth ground for a new trial.

A separate order consistent with this memorandum of decision is being filed herewith.

This the _____ day of May, 1992.

_____
James B. McMillan
United States District Judge

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division
C-C-88-533-M

LARRY EDWARD DIXON and SALLY DIXON, Plaintiffs, -vs- SEABOARD SYSTEM RAILROAD, INC., a Virginia corporation, SEABOARD SYSTEMS RAILROAD, INC., A Virginia corporation, CSX TRANSPORTATION, INC., a Virginia corporation, and CSX CORPORATION, a Virginia corporation, Defendants.	**O R D E R**

Based upon the memorandum of decision filed simultaneously herewith,

IT IS HEREBY ORDERED:

1) That the defendants' motion for judgment notwithstanding the verdict on the FELA issues is **DENIED**;

2) That the defendants' motion for judgment notwithstanding the verdict on the common law negligence issues is **DENIED**; and

3) That the defendants' motion for a new trial is **DENIED**.

This the _____ day of May, 1992.

_____
James B. McMillan
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 10, 1993

No. 92-1652

CA-88-533-C-C-M

LARRY EDWARD DIXON; ESTATE OF SALLY H. DIXON, by her personal representative Johnathan Branch Dixon

Plaintiffs - Appellees

v.

CSX TRANSPORTATION, INCORPORATED, a Virginia corporation

Defendant - Appellant

and

SEABOARD SYSTEM RAILROAD, a Virginia corporation; SEABOARD SYSTEMS RAILROAD, INC., a Virginia corporation; CSX CORPORATION, a Virginia corporation

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. No member of the Court requested a poll on the suggestion for rehearing in banc. The original judicial panel voted to deny the petition for rehearing, with Judge Wilkinson dissenting.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

For the Court,

/s/ Bert M. Montague

CLERK

No. 93-229

Supreme Court, U.S.
FILED
SEP 13 1993
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

LARRY EDWARD DIXON
and
ESTATE OF SALLY DIXON,
by her personal representative,
Johnathan Branch Dixon,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
A Virginia Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT ON PETITIONER LARRY EDWARD DIXON'S FELA CLAIM?

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN DENYING RESPONDENT'S MOTION TO BIFURCATE?

TABLE OF CONTENTS

Questions Presented i

Table Of Authorities v

Jurisdiction 1

Introduction 1

Statement Of The Case 4

Reasons For Denying The Writ 19

I. The Court Should Not Grant Certiorari To Review The Court of Appeals' Ruling On The FELA Question . . 19

A. Petitioners Have Not Previously Raised The Question Of Whether The Southern Weighing And Inspection Bureau Was A Device To Avoid FELA Liability 19

B. The Fourth Circuit Did Not Purport to Immunize Members Of An Unincorporated Association From FELA Liability 21

C. There Was No Evidence To Support Petitioners' Belated "Device" Argument 22

D. The Court of Appeals Correctly Decided The FELA Question That Was Raised Below 24

E. The Court Of Appeals' Decision Of The FELA Question Does Not Conflict With The Decision Of Any Other Court Of Appeals, Of Any State Court Of Last Resort Or Of This Court 30

F. The FELA Question Is Not Important Enough To Warrant Certiorari 34

II. The Court Should Not Grant Certiorari To Review The Court Of Appeals' Ruling On Respondent's Motion To Bifurcate 36

A. The Court Should Not Grant Certiorari On The Bifurcation Question Because Petitioners Have Conceded That The Case Must Be Retried 36

B. The Fourth Circuit Correctly Held The District Court's Failure To Bifurcate Was The Direct Cause Of The Unfair Trial Of Both The FELA And State Law Claims 38

C. The Court of Appeals' Decision Of The Bifurcation Question Does Not Conflict With The Decision Of Any Other Court Of Appeals, Of Any State Court Of Last Resort Or Of This Court 41

D. The Bifurcation Question Is Not Important Enough To Warrant Certiorari 45

Conclusion 48

Appendix

Newton v. Western Weighing & Inspection Bureau,
No. 4-76-Civil-568 (D. Minn., May 13, 1977) . Appendix

TABLE OF AUTHORITIES

Cases

Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984) 39, 46

Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979) 36

Bradsher v. Missouri Pacific R.R., 679 F.2d 1253 (8th Cir. 1982) 30

Cannon v. U.S. Acoustics Corp., 532 F.2d 1118 (7th Cir. 1976) (per curiam) 47

Cavanaugh v. Western Maryland Ry., 729 F.2d 289 (4th Cir.), *cert. denied*, 469 U.S. 872 (1984) 46

Cazad v. Chesapeake & O. Ry., 622 F.2d 72 (4th Cir. 1980) 39

Chicago, R.I. & P. Ry. v. Bond, 240 U.S. 449 (1916) 27

County of Los Angeles v. Davis, 440 U.S. 625 (1979) 36

C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas, 411 F.2d 1379 (4th Cir. 1969) 46

Demarest v. Manspeaker, 498 U.S. 184 (1991) 21

Dougall v. Spokane P. & S. Ry., 207 F.2d 843 (9th Cir. 1953) 22

Dugas v. Kansas City Southern Ry. Lines, 473 F.2d 821 (5th Cir.), *cert. denied*, 414 U.S. 823 (1973) . . . 14

Dupont v. Southern Pacific Co., 366 F.2d 193 (5th Cir. 1966), *cert. denied*, 386 U.S. 958 (1967) 46

Durham v. Southern Ry., 254 F. Supp. 813 (W.D. Va. 1966) 41

Edwards v. Pacific Fruit Express Co., 390 U.S. 538 (1968) 25

Feldman v. North British & Mercantile Ins. Co., 137 F.2d 266 (4th Cir. 1943) 32

Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) 44

Hull v. Philadelphia & R. Ry., 252 U.S. 475 (1920) 25

Ikerd v. Lapworth, 435 F.2d 197 (7th Cir. 1970) 47

In re Innotron Diagnostics, 800 F.2d 1077 (Fed. Cir. 1986) 45

Johnson v. Louisville & N. R.R., 394 S.W.2d 110 (Ky. 1965), *cert. denied*, 384 U.S. 921 (1966) 27

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) 3, 16, 26, 27, 29, 33, 34

Kelsaw v. Union Pacific R.R., 686 F.2d 819 (9th Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983) 40

Lindsey v. Louisville & N. R.R., 775 F.2d 1322 (5th Cir. 1985) 30, 33

Linstead v. Chesapeake & O. Ry., 276 U.S. 28 (1928) 27

Monessen S. Ry. v. Morgan, 486 U.S. 330 (1988) . . . 14

Newton v. Western Weighing & Inspection Bureau, No. 4-76-Civil-568 (D. Minn., May 13, 1977) 23, 30, 35

New York C. & H.R. R.R. v. Tonsellito, 244 U.S. 360 (1917) 9, 45

Nicholson v. Hugh Chatham Memorial Hospital, Inc., 300 N.C. 295, 266 S.E.2d 818 (1980) 40

Norfolk & W. Ry. v. Liepelt, 444 U.S. 490 (1980) . . . 14

Pelliccioni v. Schuyler Packing Co., 140 N.J. Super. 190, 356 A.2d 4 (App. Div. 1976) 32

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 36

Robinson v. Baltimore & O. R.R., 237 U.S. 84 (1915) 26, 34

Rossanno v. Blue Plate Foods, Inc., 314 F.2d 174 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963) 42

Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843, *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982) 14

Seaboard Coast Line R.R. v. Gillis, 294 Ala. 726, 321 So. 2d 202 (1975) 32

Selser v. Pacific Motor Trucking Co., 770 F.2d 551 (5th Cir. 1985) 22

Shenker v. Baltimore & O. R.R., 374 U.S. 1 (1963) 29

Shipp v. United Stage Lines, Inc., 192 N.C. 475, 135 S.E. 339 (1926) 14

Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980) 2, 40

Sporia v. Pennsylvania Greyhound Lines, Inc., 143 F.2d 105 (3d Cir. 1944) 47

Stich v. United States, 730 F.2d 115 (3d Cir.), *cert. denied*, 469 U.S. 917 (1984) 42

United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961) 46

United States v. Calabrese, 645 F.2d 1379 (10th Cir.), *cert. denied*, 451 U.S. 1018 (1981) 43

Vanskike v. ACF Industries, Inc., 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) 31

Walling v. Portland Terminal Co., 330 U.S. 148 (1947) 31

Walling v. Western Weighing & Inspection Bureau, 160 F.2d 47 (7th Cir. 1946) 31

Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920) . . 25

Statutes and Rules

Fed. R. Civ. P. 8(e)(2) 38

Fed. R. Civ. P. 12(b)(6) 9

Fed. R. Civ. P. 18 38

Fed. R. Civ. P. 19 38

Fed. R. Civ. P. 20 38

Fed. R. Civ. P. 20(b) 38

Fed. R. Civ. P. 21 . . . . . 38, 47

Fed. R. Civ. P. 42 47

Fed. R. Civ. P. 42(b) 38

N.C. Gen. Stat. § 1B-1(i)(3) (1983) 42

Sup. Ct. R. 10.1(a) 32

Sup. Ct. R. 14.1(a) 37

28 U.S.C. § 1254(1) (1988) 1

28 U.S.C. § 1257 (1988) 1

29 U.S.C. §§ 201-219 (1988) 31

45 U.S.C. §§ 51-60 (1988) 2

45 U.S.C. § 51 (1988) 9, 25, 34

45 U.S.C. § 53 (1988) 40

45 U.S.C. § 55 (1988) 20, 22, 23

46 U.S.C. § 688 (1988) 44

Respondent CSX Transportation, Inc. respectfully submits this Opposition to the Petition for Writ of Certiorari that it received August 12, 1993.

JURISDICTION

This Court's jurisdiction arises under 28 U.S.C. § 1254(1) (1988), not § 1257 as Petitioners incorrectly state.

INTRODUCTION

This case involves a railway grade crossing accident in which a motorist, Petitioner Larry E. Dixon, while driving to do work for one railroad, Southern Railway, happened to be struck by a train operated by another railroad, Respondent CSX Transportation, Inc.,[1] for which he was not working.

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[1] At the time of the accident, CSX was named Seaboard System Railroad, Inc. The name was changed in 1986. To avoid confusion, Respondent will be referred to herein as "CSX." CSX Transportation, Inc. is a wholly-owned subsidiary of CSX Corporation. The following are non-wholly owned subsidiaries of CSX Transportation, Inc.: The Akron Union Passenger Depot Co., Allegheny and Western Railway Co., Augusta and Summerville Railroad Co., The Baltimore and Cumberland Valley Rail Road Extension Co., Beaver Street Tower Co., Belt Railway Co. of Chicago,

In order to avoid the fatal effect of Mr. Dixon's contributory negligence under North Carolina state law[2], Petitioners filed a spurious claim under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1988), along with their state law claims. The District Court *first* failed and refused to determine Mr. Dixon's FELA status as a matter of law, *second* failed and refused to have Mr. Dixon's FELA status determined before trial of the liability and damage issues arising on the FELA and state law claims, and *third* tried the

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Central Florida Pipeline Corp., The Central Railroad Co. of South Carolina, Central Transfer Railway and Storage Co., Chatham Terminal Co., The Cleveland Terminal & Valley Railroad Co., Dayton and Michigan Railroad Co., The Home Avenue Railroad Co., The Lakefront Dock and Railroad Terminal Co., Nicholas, Fayette and Greenbrier Railroad Co., Norfolk and Portsmouth Belt Line Railroad Co., North Charleston Terminal Co., Terminal Railroad Association of St. Louis, TTX Co., Winston-Salem Southbound Railway Co. and Woodstock & Blocton Railway Co.

[2] Under North Carolina law, contributory negligence bars recovery. *E.g., Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980).

mutually exclusive FELA and state law claims to the same jury resulting in the introduction of highly prejudicial, inflammatory and incitive evidence on both claims and an unfair trial for CSX.

The Fourth Circuit reversed the judgment on Mr. Dixon's FELA claim because Petitioners failed to prove that he was employed by CSX at the time of his injury as mandated by this Court's holding in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), thereby entitling CSX to judgment n.o.v. The Fourth Circuit also vacated the judgment on the state law claims and ordered a new trial on those claims on the grounds that CSX had been denied a fair trial due to: (1) the District Court's refusal to bifurcate the issues and determine first Mr. Dixon's FELA status, resulting in the introduction of highly prejudicial, inflammatory and irrelevant evidence in the simultaneous trial of the mutually exclusive claims; and (2) the admission of testimony of a "survey" by

Petitioners' human factors expert of how motorists approach the accident crossing which the Court of Appeals found to be erroneous and prejudicial and an independent ground of "reversible error" on both the FELA and state law claims. (App. at A:63)

Petitioners do not challenge or request review of the expert testimony ruling in their Petition for Certiorari. Hence, a new trial is inevitable in this case -- no matter how this Court disposes of the certiorari petition.

Furthermore, for the reasons set forth below, neither of the issues on which Petitioners seek a writ of certiorari is worthy of this Court's review.

STATEMENT OF THE CASE

On November 8, 1985, Mr. Dixon was injured when the car he was driving collided with a train operated by CSX in Mecklenburg County, North Carolina. Mr. Dixon was an employee of the Southern Weighing & Inspection Bureau

(SWIB), an unincorporated association formed early in this century that, at the time of Mr. Dixon's injury, was comprised of some 68 railroads including CSX.[3] SWIB worked with freight shippers and consignors to weigh, classify, mark and pack freight uniformly. In addition to achieving certain economics of scale, SWIB was intended to provide shippers and any subsequent carriers with an independent assessment of the factors used by the initial carrier in setting the freight charges.

At the time of the accident, Mr. Dixon was en route to Blacksburg, South Carolina, to a warehouse where he was

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[3] Petitioners assert that by 1984, the year before Mr. Dixon's accident, SWIB's membership had "declined dramatically." Petition at 19. This is not true and there is no evidence of any such decline in the record. As a result of economic changes in the railroad industry, SWIB was disbanded in 1986. The other weighing and inspection bureaus located in other parts of the country were also disbanded during the 1980s.

to install a transit agreement[4] for Southern Railway, another member of SWIB, that would govern the storage and shipment of wood pulp that was to be transported by Southern Railway to and from the warehouse. CSX did not have any tracks to or from Blacksburg, so it could not transport freight to and from there pursuant to the transit agreement.[5] CSX did not have any knowledge of the work in which Mr. Dixon was

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[4] A transit agreement allows a shipper to have one through rate for his shipment from point of origin to point of ultimate destination rather than a combination of rates to and from a storage facility where the goods might be temporarily stopped or stored.

[5] In their Petition, Petitioners assert without any evidentiary basis in the record that the wood pulp was later going to be shipped to Pennsylvania or Ohio, that Southern Railway would only have been the initial carrier and that the rate set by the Southern Railway tariff would have applied to CSX or any other railroad that participated in the second leg of the shipment. Petition at 16 & n.2. There was no evidence introduced that the wood pulp was to be shipped to Pennsylvania, Ohio or any other known location, that Southern Railway would not be the only carrier or that CSX would ever have transported any freight covered by the transit agreement.

engaged for Southern Railway. Pursuant to SWIB's internal operating procedures, Mr. Dixon and all other SWIB employees were prohibited from disclosing information about work performed for one member railroad, in this case Southern Railway, to any other member railroad including CSX.[6]

Pursuant to SWIB's articles of organization, the installation of transit agreements was left to SWIB's general manager and SWIB personnel. The undisputed evidence showed that the shipper of the wood pulp had contacted SWIB's management and requested that the transit agreement be installed pursuant to a tariff published by Southern Railway. SWIB's division manager then gave Mr. Dixon the

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[6] Petitioners' assertion that this confidentiality rule was created by the member railroads, Petition at 14-15, is again unsupported by the record. The undisputed evidence was that this and all other rules governing the conduct of SWIB employees were established by SWIB's general manager and his subordinants.

specific assignment to go to Blacksburg to install the transit agreement. SWIB allocated Mr. Dixon's time for the day of the accident to Southern Railway. Thus, as the Fourth Circuit noted, "he was effectively paid for his services on that day not by CSX, but by Southern Railway." (App. at A:36)

After receiving this assignment, Mr. Dixon drove his own car towards Blacksburg. The undisputed evidence was that CSX had no right to tell Mr. Dixon what means of transportation to use, what route to travel or how to operate his car in traveling to Blacksburg. If Mr. Dixon had reached Blacksburg, he would have gone to a warehouse where no CSX personnel would have been present. He would have followed SWIB procedures, developed by SWIB management, in performing his duties.

On November 8, 1988, Mr. Dixon filed suit against CSX alleging alternative, inconsistent personal injury claims under FELA and under North Carolina law. His wife Sally

Dixon also asserted a claim for loss of consortium.[7]

On February 14, 1991, CSX moved to bifurcate the trial of the case so as to try first the issue of whether Mr. Dixon was employed by CSX and then, depending on how that issue was resolved, to try *either* Mr. Dixon's FELA claim *or* Petitioners' state law claims.[8] On April 11, 1991, without holding a hearing, Judge McMillan signed an order denying the motion.[9] The order did not contain any explanation of the

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[7] Mrs. Dixon originally asserted her consortium claim under both FELA and state law, but the District Court dismissed the claim under FELA pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. That ruling was not appealed.

[8] If Mr. Dixon was "employed by" CSX at the time of his injury within the meaning of 45 U.S.C. § 51 (1988), FELA provides the exclusive remedy. *E.g., New York C. & H.R. R.R. v. Tonsellito*, 244 U.S. 360, 361-62 (1917). If Mr. Dixon was not "employed by" CSX, FELA does not apply and North Carolina law provides whatever remedies Petitioners may have.

[9] Contrary to Petitioners' assertion, the District Court's Pretrial Order did not prohibit CSX from filing the bifurcation

Court's reasoning.[10]

The case was tried before Judge McMillan from June 10 through June 19, 1991. As CSX had forecast in its motion to bifurcate, the simultaneous trial of the incompatible FELA and state law claims resulted in a procedural quagmire that Petitioners artfully exploited. The Fourth Circuit highlighted at length the "inevitable effect" of the denial of the motion to bifurcate:

> As a consequence of the simultaneous trial of the FELA claim and the North Carolina causes of action, the jury heard inflammatory evidence on Mrs. Dixon's loss of consortium that, although relevant to the Dixons' state law claims, was irrelevant to the FELA claim,

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motion. Rather, since the case had previously been on a trial calendar, it merely required that CSX obtain leave of court to file the motion. CSX requested leave to file the motion and the District Court granted leave to file it.

[10] Near the end of the trial, Judge McMillan did not recall that a bifurcation motion had been made and inquired whether anyone had ever objected to trying the incompatible claims together. (Trial Tr. at 1418)

and it heard incitive evidence relevant to the FELA claim that was irrelevant to the Dixons' state law actions. . . .

With respect to the loss of consortium claim, the jury heard emotional testimony from Mrs. Dixon that she had had a "wonderful marriage" with Mr. Dixon; that her husband had always been affectionate and considerate toward her; that the two had had a "wonderful sex relationship"; but that their relationship had been unalterably affected for the worse as a result of the accident. *Id.* at 785-87, 791-92, 807. This testimony was so powerful that, according to CSX, *see* Appellant's Br. at 45, several jurors openly wept during its presentation. Additionally, the Dixons introduced birthday and anniversary cards that they had exchanged over the years as evidence of the quality of the relationship that they had enjoyed prior the accident. J.A. at 805-07, 1138-61.

The jury also viewed the videotaped deposition of Dr. Kirkwood Schultz, who testified that the accident had plunged Mrs. Dixon into a severe suicidal depression and forced her to work "when her feet were rotting off and pus was running out of her feet" and otherwise to jeopardize her health in order to keep the family together. *Id.* at 698-99. All of this evidence, of course, was admissible on the issue of Mrs. Dixon's

damages, and perhaps even on the issue of Mr. Dixon's damages, under state law. Because loss of consortium is not actionable under FELA, however, *see supra* note 3, this highly prejudicial evidence was irrelevant to Mr. Dixon's FELA claim. . . .

With respect to Mr. Dixon's FELA claim, the jury heard extensive testimony on the question of whether Mr. Dixon was employed by CSX. Two former SWIB employees testified that they considered themselves CSX employees and Mrs. Dixon and her son testified that they believed Mr. Dixon worked for the railroad. J.A. at 536-37, 559-60, 579-81, 770-71, 783-84. There was also testimony from the former general manager of SWIB that Mr. Dixon was covered under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, *id.* at 519-21, 525-26, statutes that differ significantly from FELA in that they expressly cover weighing and inspection bureau employees, *see* 45 U.S.C. §§231(a)(1)(i), (iv); 351(a), (b). Appellees presumably intended for the jury to infer from this testimony that Dixon was, or at least thought he was, a railroad employee for purposes of FELA.

This testimony regarding Mr. Dixon's employment served as the foundation for Dixon's closing argument in which counsel characterized CSX as a "ruthless" employer

> more concerned with "the bottom line" than with the well-being of its employees, J.A. at 964; an employer that "no longer want[ed] to have to contribute to [its] responsibilities to the employees [it] formerly had [*i.e.*, Mr. Dixon]," *id.* at 941; and an employer that had bullied employees, threatening them with termination if they did not testify in the railroad's favor at Mr. Dixon's trial. *Id.* at 963-64. While all of this testimony was relevant to an issue that was indisputably central to Dixon's FELA claim, it was wholly irrelevant to the Dixons' state law claims and undoubtedly prejudicial to CSX, especially given the way in which it was drawn together by counsel in closing argument. (App. at A:10 to 16) (footnote omitted)

After denying CSX's motions for directed verdict, the District Court allowed the jury to return two verdicts in favor of Petitioners. The first verdict awarded Mr. Dixon $13,609,308 on his FELA claim. The second verdict awarded Mr. Dixon the *identical* amount on his state law claims, although the jury had been instructed to apply a substantially different measure of damages than it had applied on the FELA

claim,[11] and awarded Mrs. Dixon $1,500,000 for her loss of consortium. As the Fourth Circuit's assessed the result:

> Although these significantly different methods for calculating damages would almost inescapably result in different damage awards, the jury awarded Mr. Dixon precisely the same amount ($13,609,308) on his North Carolina and FELA claims. It is evident from the identical verdicts that the jury was unable to distinguish between the FELA and the state law claims, at least insofar as the measures of damages were concerned. (App. at A:18 to 19) (footnote omitted)

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[11] The jury was instructed that wage losses under FELA are computed after the deduction of taxes, *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980), but not under North Carolina law, *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843, *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982), that loss of enjoyment of life is an element of the pain and suffering damages available under FELA, *e.g., Dugas v. Kansas City Southern Ry. Lines*, 473 F.2d 821 (5th Cir.), *cert. denied*, 414 U.S. 823 (1973), but not under North Carolina law, and that future pecuniary damages should be reduced to present value under FELA, *e.g., Monessen S. Ry. v. Morgan*, 486 U.S. 330 (1988), but under North Carolina law all future damages, including pain and suffering, must be reduced to present value, *e.g., Shipp v. United Stage Lines, Inc.*, 192 N.C. 475, 135 S.E. 339 (1926).

The District Court then entered an alternative judgment that Mr. Dixon recover $13,609,308 under FELA and that "in the event that the Plaintiff Larry Edward Dixon's recovery under the FELA is not sustained on appeal" Mr. Dixon recover $13,609,308 and Mrs. Dixon recover $1,500,000 under North Carolina law. CSX's motions for judgment notwithstanding the verdict and a new trial were denied.

On appeal, the Fourth Circuit in an opinion by Circuit Judge J. Michael Luttig first held that the District Court had abused its discretion in denying CSX's motion to bifurcate. The Court recognized that "trial courts must be given wide latitude in managing the litigation before them," but held that "under the particular circumstances of this case" the motion to bifurcate should have been granted. (App. at A:10) As quoted above, the Court analyzed the effect of the "inflammatory," "incitive" and "highly prejudicial" evidence

that the joint trial permitted Petitioners to introduce and the ensuing jury confusion which lead it to conclude:

> The district court undoubtedly believed that the simultaneous trial of these two alternative causes of action would conserve judicial resources and save all parties and witnesses time and expense. Whether or not these laudable goals were served by the single proceeding, "a trial must remain fair to both parties, and such considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice." *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (*en banc*), *cert. denied*, 464 U.S. 1040 (1984). In the circumstances of this case, we are left with the firm conviction that, because the district court tried the federal and state claims together, thereby exposing the jury to the inflammatory and irrelevant evidence on the respective claims recited above, CSX did not receive a fair trial on either the FELA or the state law claims. (App. at A:19-20)

Second, the Fourth Circuit, applying this Court's decision in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), held that the District Court erred in denying CSX's

motions for directed verdict and JNOV on the FELA claim.

As the Court explained:

> Under these circumstances, we do not believe that jurors, applying the factors set forth in *Kelley*, could reasonably conclude that Mr. Dixon was employed by CSX at the time of his injury. Mr. Dixon clearly was not performing services for CSX. As a SWIB traveling agent, he was on assignment to perform services on behalf of SWIB member Southern Railway. Even if Mr. Dixon were deemed to be performing services for each member railroad whenever he performed services for any one of the railroads or for SWIB as an association, and thus were regarded as having been performing services for CSX at the time of the accident, he certainly was not in any sense subject to CSX's control during the performance of these services. He was subject to control only by SWIB and, arguably, Southern Railway. CSX did not even know where Mr. Dixon was at the time of the accident or what work he had been assigned to perform that morning. And because his time on the day of the accident was allocated to Southern, he was effectively paid for his services on that day not by CSX, but by Southern Railway. (App. at A:34 to 36) (citations omitted)

Finally, the Fourth Circuit also held that the District

Court committed "reversible error" in admitting testimony from a "human factors" expert about a survey conducted three years after the accident concerning how various percentages of motorists approached the grade crossing *with no train present*. Mr. Dixon's counsel used the expert's testimony to argue to the jury that they could not find Mr. Dixon contributorily negligent because he drove as well or better than most of the motorists observed in the study. The Court of Appeals held this testimony was inconsistent with the objective standard of a reasonably prudent person and should not have been admitted. (App. at A:59 to 63)[12]

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[12] Because of the way it resolved the appeal, the Fourth Circuit did not address a number of other issues. These included (i) whether the District Court erred in admitting evidence that Mr. Dixon as a SWIB employee was covered by the Railroad Retirement Act and the Railroad Unemployment Insurance Act which unlike FELA expressly cover weighing and inspection bureau employees, (ii) whether the District Court erred in admitting lay opinion testimony from Mrs. Dixon and former SWIB employees that Mr. Dixon was an employee of CSX and covered by FELA, (iii) whether Judge

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' RULING ON THE FELA QUESTION

A. Petitioners Have Not Previously Raised The Question Of Whether The Southern Weighing & Inspection Bureau Was A Device To Avoid FELA Liability

Petitioners state the first question in their Petition as whether "a railroad [can] avoid coverage under the Federal Employer's Liability Act by joining with other railroads in an

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McMillan erred during his jury charge in summarizing the purported "testimony" of Mr. Dixon who did not testify and cannot speak *and* a series of legal contentions of which there was no evidence and which Petitioners did not assert, (iv) whether Mr. Dixon's attorney made improper remarks in closing argument, (v) whether the damages awarded were not supported by the evidence, inconsistent or excessive, (vi) whether the consortium award was the product of inflammatory uncorroborated hearsay about a purported suicide attempt by Mrs. Dixon, and (vii) whether the District Court erred in submitting the state law claims to the jury after they had returned a verdict finding that Mr. Dixon was covered by FELA.

unincorporated association for the purpose of jointly employing persons to do work exclusively for the member railroads." Petition at i. Petitioners have not previously raised this argument in either the District Court or the Fourth Circuit; the Fourth Circuit did not rule that a railroad can avoid FELA coverage by joining an unincorporated association; and there is no evidence to support such an argument.

The FELA provides that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 U.S.C. § 55 (1988). Petitioners did not allege in the complaint that SWIB was a device to avoid FELA coverage, did not present evidence of any such theory at trial, did not argue a violation of § 55 to either the District Court or the Court of Appeals and still do not even cite § 55 in their

petition for certiorari. This Court does not review questions that were not raised below. *E.g., Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991).

B. The Fourth Circuit Did Not Purport To Immunize Members Of An Unincorporated Association From FELA Liability

Contrary to Petitioners' entire presentation of their first question, the Fourth Circuit did not even purport to immunize the members of an unincorporated association from FELA liability. If the Court of Appeals had concluded that there was evidence from which a jury reasonably could have found that Mr. Dixon was employed by CSX at the time of his injury, but nevertheless concluded that CSX was not liable because the services were performed through SWIB, then Petitioners' distorted statement of the FELA coverage question might have some validity. The Fourth Circuit merely held that Mr. Dixon was not "employed by CSX at the time of his injury" because he "clearly was not performing services for CSX" and

"he certainly was not in any sense subject to CSX's control during the performance of these services." (App. at A:34 to 35)

C. There Was No Evidence To Support Petitioners' Belated "Device" Argument

Even if Petitioners had raised a § 55 issue below, there is absolutely no evidence to sustain such a contention. The express terms of § 55 only condemn those devices "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability" under FELA. 45 U.S.C. § 55 (1988). The courts of appeals have consistently interpreted the statute to apply only when there is proof of such an intent. *E.g., Selser v. Pacific Motor Trucking Co.*, 770 F.2d 551, 554 (5th Cir. 1985); *Dougall v. Spokane P. & S. Ry.*, 207 F.2d 843, 847 (9th Cir. 1953). There is no

evidence of such purpose or intent on this record.[13] Nor is there any reason for the Court to review the meaning of § 55

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[13] As noted, SWIB was formed in the early 1900's to provide a variety of services throughout the southern United States for its railroad members and shippers, including installing transit agreements such as the one that Mr. Dixon was en route to install. In addition to achieving certain economics of scale, SWIB and the comparable weighing and inspection bureaus located in other parts of the country provided both shippers and other railroads with an independent assessment of the weight and other factors that fixed the freight charges for a shipment. The bureaus thus existed for economic reasons wholly independent of FELA. When economic conditions changed in the 1980's so as to eliminate most of the types of accounts serviced and policed by the bureaus, they were disbanded even though FELA continues to apply to their former member railroads.

Finally, the employees of SWIB and the other bureaus mostly performed paperwork, hardly the type of work that would have exposed the member railroads to any significant FELA exposure. This is well illustrated by the fact that apparently only one other case has involved an attempt by a weighing and inspection bureau employee to recover from a member railroad under FELA. *Newton v. Western Weighing & Inspection Bureau*, No. 4-76-Civil-568 (D. Minn., May 13, 1977) (copy attached) (holding plaintiff not employee of defendant railroad). Indeed, the risk to which Mr. Dixon was exposed at the time of this crossing accident case had nothing to do with his job and would have been the same if he had been driving to the grocery store or laundry.

which is well settled.

In sum, there was no evidence whatsoever that SWIB was a device to avoid FELA liability. On the contrary, it was Petitioners who sought to expand FELA coverage so that every SWIB employee would be a FELA employee of each and every one of the 68 member railroads at all times and at all places that the employee was working. The Court of Appeals properly rejected such an unprecedented expansion of FELA coverage. (App. at A:36 to 38)

D. The Court Of Appeals Correctly Decided The FELA Question That Was Raised Below

There is no reason to grant certiorari to review the FELA question actually posed by this case, whether the Court of Appeals erred in holding that the District Court should have granted CSX's motion for judgment notwithstanding the verdict on Mr. Dixon's FELA claim. Indeed, not even Petitioners urge review of this intensely fact-bound issue.

A FELA action will not lie unless Mr. Dixon established, among other elements, that he was "employed by" CSX at the time of his injury. 45 U.S.C. § 51 (1988). If the pertinent facts are not in dispute, this is a question of law for the Court. *E.g., Hull v. Philadelphia & R. Ry.*, 252 U.S. 475 (1920). Petitioners have not identified any disputed issues of material fact in their Petition to this Court.[14]

This Court has recognized on a number of occasions that the FELA does not apply to everyone employed in connection with the operation of a railroad. *E.g., Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968) (employee of railroad refrigeration car company not covered); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920) (employee of railroad express

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[14] Petitioners conceded in oral argument before the Court of Appeals that the material facts concerning Mr. Dixon's employment status were not in dispute and argued that Mr. Dixon was covered by FELA as a matter of law. *See* App. at A:36.

company not covered); *Robinson v. Baltimore & O. R.R.*, 237 U.S. 84 (1915) (employee of Pullman Company not covered). Rather, in enacting the FELA, Congress used the words "employed by" in their natural sense to require that the common law relationship of master and servant exist between the plaintiff and a common carrier by railroad at the time of injury. *E.g., Kelley v. Southern Pacific Co.*, 419 U.S. at 323-24. The FELA does not provide any right of action against *non-employer* rail carriers involved in a railroad accident.

This Court has defined a servant in the following terms:

> "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

Id. at 324 (quoting Restatement (Second) of Agency § 220(1)

(1958)).[15] Thus, to establish that he was "employed by" CSX for FELA purposes, Mr. Dixon had to prove two facts: (1) that at the time of his accident he was performing services for CSX, *e.g.*, *Linstead v. Chesapeake & O. Ry.*, 276 U.S. 28, 33-34 (1928); *Johnson v. Louisville & N. R.R.*, 394 S.W.2d 110, 112 (Ky. 1965), *cert. denied*, 384 U.S. 921 (1966); and (2) that CSX controlled or had the right to control his physical conduct in the performance of the services in which he was engaged at the time of the accident, *e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. at 324, 327 & n.9.

The undisputed evidence showed that at the time of Mr. Dixon's injury he was not performing any services whatsoever

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[15] Petitioners selectively quote this standard, omitting the requirement that the master must control or have the right to control the servant's "physical conduct in the performance of the services." *See* Petition at 28. A worker is not a servant of a railroad for FELA purposes if the railroad merely controlled or had the right to control the result to be achieved. *E.g.*, *Chicago, R.I. & P. Ry. v. Bond*, 240 U.S. 449, 456 (1916).

for CSX. In addition, CSX did not control and had no right to control how he performed his job at the time of his injury. Indeed, CSX did not give him any directions on how to get to Blacksburg, did not give him any instructions as to how to do his job in Blacksburg and did not even know he was going there because SWIB's employees were forbidden to discuss the affairs of one railroad with another railroad. On the day in question, Mr. Dixon was doing the work of Southern Railway. At most, Mr. Dixon "was subject to control only by SWIB and, arguably, Southern Railway" on the day of the accident. (App. at A:36)

Petitioners devote a considerable portion of their Petition to a description of the participation of the 68 member railroads in the various committees of SWIB and the fact that a CSX vice president served on various committees and at the time of the accident was acting as chairman of SWIB following the resignation of the previous chairman. This

Court has repeatedly emphasized that the defendant railroad must exercise or have the right to exercise "immediate control and supervision" over the details of the work, *e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. at 330 n.10; *Shenker v. Baltimore & O. R.R.*, 374 U.S. 1, 6 (1963), and has distinguished such "authoritative direction and control" from the minimum cooperation that is necessary to carry on any coordinated undertaking. *E.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. at 329-30 & n.10. Mere participation in the management of SWIB did not give CSX "immediate" or "authoritative" control over the performance of a project of which CSX was not even aware.[16]

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[16] Petitioners also misstate the involvement that the railroad representatives played in SWIB during the mid-1980's. The evidence was that SWIB was in the process of disbanding and that the only activity of the railroad representatives was to approve continued use of a prior budget and to wrap up the affairs of the bureau.

E. The Court Of Appeals' Decision Of The FELA Question Does Not Conflict With The Decision Of Any Other Court Of Appeals, Of Any State Court Of Last Resort Or Of This Court

Counsel for Respondent have located only one case that has considered whether an employee of a weighing and inspection bureau was employed by a member railroad for purposes of FELA. In *Newton v. Western Weighing & Inspection Bureau*, No. 4-76-Civil-568 (D. Minn., May 13, 1977)(copy attached), District Judge Edward J. Devitt granted summary judgment for the defendant railroad, holding that the plaintiff was not an employee of the railroad for FELA purposes.

The three Court of Appeals cases decided under FELA cited by Petitioners do not involve weighing and inspection bureaus or factual situations even remotely analogous to this case. *Lindsey v. Louisville & N. R.R.*, 775 F.2d 1322, 1324-25 (5th Cir. 1985), *Bradsher v. Missouri Pacific R.R.*, 679

F.2d 1253, 1255-56 (8th Cir. 1982), and *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 198-99 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), involved plaintiffs who were employed by the defendant railroads' subsidiaries or other entities and were injured while loading, unloading or cleaning the defendant railroads' cars in the defendant railroads' rail yards under the direction of the defendant railroads' employees.[17]

Similarly, the only FELA case decided by a state court of last resort that Petitioners cite involved a totally

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[17] Petitioners also cite, as conflicting with the Fourth Circuit's decision, a decision of the Seventh Circuit, *Walling v. Western Weighing & Inspection Bureau*, 160 F.2d 47 (7th Cir. 1946), under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988). As the Fourth Circuit observed, App. at A:24 & n.6, however, the test of employment under the Fair Labor Standards Act is not the common law master-servant standard applicable under FELA. *E.g., Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

distinguishable situation.[18] In *Seaboard Coast Line R.R. v. Gillis*, 294 Ala. 726, 321 So. 2d 202 (1975), the plaintiff was employed by the Clinchfield Railroad Co., a partnership comprised of the defendants Seaboard Coast Line Railroad Co. and Louisville & Nashville Railroad Co. Under well-established common law principles, the work performed by an employee of a partnership is by definition the work of each partner and each partner has the right to control the manner in which that employee performs the work. The same is not true of an unincorporated association. *See, e.g., Feldman v. North*

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[18] Petitioners also cite a decision of an intermediate appellate court in New Jersey, *Pelliccioni v. Schuyler Packing Co.*, 140 N.J. Super. 190, 356 A.2d 4 (App. Div. 1976). This Court's rules provide that a conflict to warrant certiorari must be with a state court "of last resort." Sup. Ct. R. 10.1(a). Moreover, in *Pelliccioni*, the accident happened in the railroad's yard while the plaintiff was operating a yard tractor to move truck trailers that were either incoming or outgoing on the railroad's trains and neither plaintiff nor his nominal employer, a wholly-owned subsidiary of the railroad, ever worked on any railroad business other than that of the railroad defendant.

British & Mercantile Ins. Co., 137 F.2d 266, 268 (4th Cir. 1943) (mere membership in unincorporated association does not subject members to liability for unlawful acts of employee of association).

In an effort to manufacture a conflict where none exists, Petitioners cite and discuss at some length a number of cases decided under state workers' compensation laws.[19] Petition at 23-25, 33-39. These cases do not involve FELA, but rather a variety of state statutes. Further, they do not involve an unincorporated association such as SWIB, but rather partnerships or joint ventures or employees concededly hired

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[19] Petitioners predicate this argument on dictum in a Fifth Circuit case, *Lindsey v. Louisville & N. R.R.*, 775 F.2d 1322, 1324 (5th Cir. 1985), where the Court, without citation of any authority, stated that the test of FELA coverage is "the established test in workers' compensation cases." The *Lindsey* Court plainly did not intend to incorporate by reference the varied coverage provisions of the nation's 50 plus workers' compensation statutes. Rather, the Court immediately quoted and then applied this Court's decision in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974). 775 F.2d at 1324.

by two different entities. Finally, none of them involves a fact situation comparable to this case: an employee of an unincorporated association seeking to recover from a member of the association for whom the employee was not performing any services and who did not control the employee's physical conduct in the performance of his work at the time and place of the accident.

F. The FELA Question Is Not Important Enough To Warrant Certiorari

The Fourth Circuit merely applied principles of law long settled by this Court to a fact situation that is not likely to recur. This Court has consistently held since shortly after the FELA was passed that Congress used the words "employed by" in § 51 to refer to a common law master-servant relationship. *Robinson v. Baltimore & O. R.R.*, 237 U.S. 84, 94 (1915). It has reaffirmed that principle on a number of occasions, most recently in *Kelley v. Southern Pacific Co.*,

419 U.S. at 323-24. The Fourth Circuit correctly applied these principles to the uncontradicted evidence of this case where the plaintiff was employed by an unincorporated association of more than five dozen railroads and was not performing services for the defendant railroad at the time of his injury.

As noted above, this case and *Newton v. Western Weighing & Inspection Bureau*, No. 4-76-Civil-568 (D. Minn., May 13, 1977), are apparently the only cases that have addressed whether a plaintiff employed by such an unincorporated association of railroads has a right of action under FELA against a member railroad. Thus, the issue appears to be one of only limited significance. In addition, SWIB and the other weighing and inspection bureaus have been disbanded as a result of economic changes in the railroad industry so the factual situation presented in this case is not likely to recur.

II. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' RULING ON RESPONDENT'S MOTION TO BIFURCATE

A. The Court Should Not Grant Certiorari On The Bifurcation Question Because Petitioners Have Conceded That The Case Must Be Retried

This Court has long refrained from rendering advisory opinions, deciding questions that are moot or not yet ripe and addressing issues that are only of scholarly interest. *E.g.*, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 305 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625, 632-33 (1979); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Considerations of this sort ensure that this Court's role is carefully limited to decision of actual controversies in which the parties have a concrete stake.

As noted in the Statement of the Case, the Court of Appeals vacated the District Court's decision and remanded

the case for a new trial because the District Court committed *three* errors in the trial of this cause: (1) denying CSX's motion to bifurcate; (2) denying CSX's motion for judgment notwithstanding the verdict on the FELA claim; and (3) admitting testimony from an expert witness that was contrary to the standards of the applicable substantive law. Petitioners have not asked the Court to review the Fourth Circuit's holding that *the case must be retried because of the improper admission of expert testimony*. Since this Court does not review questions that are not raised in the certiorari petition, Sup. Ct. R. 14.1(a), there will have to be a new trial regardless of this Court's disposition of the certiorari petition. The most that would be determined by any proceedings before this Court is whether that trial will involve a FELA claim, a FELA claim and state law claims or just state law claims.

As argued in the preceding section of this Brief, the FELA question does not warrant certiorari. If the Court does

not grant certiorari on that question, the FELA claim will no longer be in issue and the new trial will be limited to the state law claims so any decision this Court might make on the bifurcation question would not affect the further course of proceedings in this action.

B. The Fourth Circuit Correctly Held The District Court's Failure To Bifurcate Was The Direct Cause Of The Unfair Trial Of Both The FELA And State Law Claims

The Federal Rules of Civil Procedure allow virtually unlimited joinder of claims and parties at the pleading stage, *see* Fed. R. Civ. P. 8(e)(2), 18, 19, 20, but give the district courts the authority to sever claims, *id.* 21, and to order separate trials of claims or issues to prevent or avoid prejudice, *id.* 20(b), 42(b). In an en banc decision rendered 10 years ago, the Fourth Circuit set forth the controlling standard that it applied in this case:

> [A] trial must remain fair to both parties, and such considerations of convenience may not

> prevail where the inevitable consequence to another party is harmful and serious prejudice. *Molever v. Levenson*, 539 F.2d 996, 1003 (4th Cir.1976), *cert. denied*, 429 U.S. 1024, 97 S.Ct. 643, 50 L.Ed.2d 625 (1976). Consolidation, or refusal to sever, where prejudice results under the facts and circumstances of the particular case, amounts to abuse of discretion, constituting reversible error. *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 196 (5th Cir.1966), *cert. denied*, 386 U.S. 958, 87 S.Ct. 1027, 18 L.Ed.2d 106 (1967).

Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 906 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984).

A FELA claim differs significantly from a negligence claim arising under North Carolina law. While both claims involve issues of negligence and contributory negligence, the FELA issues are controlled by federal law which may impose duties on a railroad as employer and a plaintiff as employee that differ substantively from those imposed by state law. *See, e.g., Cazad v. Chesapeake & O. Ry.*, 622 F.2d 72, 75 & n.3 (4th Cir. 1980). North Carolina continues to follow the

common law rule that any contributory negligence bars recovery. *E.g., Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980). The FELA employs a modified form of comparative negligence. 45 U.S.C. § 53 (1988). In addition, as noted above, the measures of damages differ substantially.[20] Finally, and perhaps most significantly for this lawsuit, FELA does not permit recovery for Mrs. Dixon's loss of consortium, *e.g., Kelsaw v. Union Pacific R.R.*, 686 F.2d 819, 820-21 (9th Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983), but North Carolina law does, *e.g., Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980).

By denying CSX's motion to bifurcate, the District Court opened the door for Petitioners to introduce what the Fourth Circuit described as "inflammatory," "incitive" and "highly

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[20] *See* note 11 *supra*.

prejudicial" evidence which, as the Fourth Circuit also noted, ultimately resulted in demonstrable confusion of the jury. (App. at A:10, 11, 13, 16) *See* pages 10-14 *supra*.

C. The Court Of Appeals' Decision Of The Bifurcation Question Does Not Conflict With The Decision Of Any Other Court Of Appeals, Of Any State Court Of Last Resort Or Of This Court

Petitioners have cited only one FELA case that they claim conflicts with the Court of Appeals' decision. In *Durham v. Southern Ry.*, 254 F. Supp. 813, 814-16 (W.D. Va. 1966), a district court refused to bifurcate a state law wrongful death claim against one defendant from two FELA claims against other defendants. The decision was not appealed and, in any event, it does not involve mutually exclusive claims so it does not conflict with the Court of Appeals' decision in this case. The risks of prejudice and jury confusion are substantially less when the different claims are

asserted against different defendants.[21]

Unable to find any conflicting FELA cases, Petitioners argue that the Fourth Circuit did not evaluate the District Court's denial of the motion to bifurcate as of the time it was made but improperly looked at what in fact happened at trial, an analysis that Petitioners assert conflicts with that followed by other courts of appeals. The cases Petitioners cite on this point, Petition at 44, do not support such a rule.[22]

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[21] The North Carolina General Assembly apparently believes that even in that situation the risk of confusion is too great. When a plaintiff asserts a FELA claim against one defendant and a state law claim against another for the same injuries, the North Carolina General Statutes provide that the damages shall be determined under the provisions of FELA. N.C. Gen. Stat. § 1B-1(i)(3)(1983). That statute does not apply to alternative claims against the same defendant.

[22] *Stich v. United States*, 730 F.2d 115, 117 (3d Cir.), *cert. denied*, 469 U.S. 917 (1984), involves the district court's discretion in admitting evidence, not in severing claims or issues for trial. *Rossanno v. Blue Plate Foods, Inc.*, 314 F.2d 174, 176 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963), uses the words "[w]hen the ruling was made" quoted by Petitioners as a preface to a description of the record before the district

In addition, Petitioners' argument misinterprets the Fourth Circuit's decision and reasoning. A district court's decision will not be reversed on appeal merely because it is erroneous. The error must be prejudicial. In this case, it was necessary for the Fourth Circuit to focus on what transpired at trial to point out that the District Court's denial of CSX's motion to bifurcate and simultaneous trial of the FELA and state law claims did seriously prejudice CSX. This is not contrary to the decisions of other courts of appeals, but rather is fully consistent with fundamental precepts of appellate

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court when it ruled, but does not state that the appellate court may not consider the consequences of the district court's ruling in determining whether it abused its discretion. Finally, in *United States v. Calabrese*, 645 F.2d 1379, 1385 (10th Cir.), *cert. denied*, 451 U.S. 1018 (1981), the Court of Appeals' statement quoted by Petitioners that it "cannot by hindsight find an error on this basis" refers to the "unexpected conduct" of an attorney or party that required a mistrial in that case and does not purport to prohibit an appellate court from considering the consequences of a district court's ruling in reviewing it.

review.

Finally, Petitioners erroneously assert that the Fourth Circuit's ruling is in conflict with this Court's decision in *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). Contrary to Petitioners' assertion, *Fitzgerald* dealt with the problem of trying jury and non-jury claims in the same proceeding, a concern that has nothing to do with this case.[23]

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[23] In *Fitzgerald*, the plaintiff asserted a claim under the Jones Act, 46 U.S.C. § 688 (1988), as to which there was a right to a jury trial, and a claim for maintenance and cure under admiralty law, as to which no right to a jury existed, two cumulative claims that involved some, but not all, of the same elements of damages. The district court tried the Jones Act claim to a jury and then took additional evidence and decided the admiralty claim itself. This Court held that procedure to be error, reasoning that it complicated and confused the trial, created difficulties in applying the doctrines of res judicata and collateral estoppel and could easily result in too much or too little recovery since the interrogatories submitted to the jury were not (and as a practical matter could not be made) sufficiently detailed to determine what factual findings the jury had made and what elements of loss their verdict had compensated. *Id.* at 19-20.

The procedure CSX proposed in its motion to bifurcate posed none of the risks that concerned this Court in

D. The Bifurcation Question Is Not Important Enough To Warrant Certiorari

Contrary to Petitioners' parade of horrors, the Court of Appeals' ruling on the bifurcation motion will not dramatically affect the trial of all complex cases in the federal courts[24] and does not purport to alter the District Court's broad discretion

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Fitzgerald. CSX asked the District Court to try first the issue of whether Mr. Dixon was employed by CSX within the meaning of the FELA and then, depending on the answer to that issue, to try *either* the FELA claim *or* the state law claims. The first jury verdict would not have answered any issue that would have been raised in the second phase. In addition, unlike the Jones Act and maintenance and cure remedies which are cumulative, the FELA remedy if applicable is exclusive. *E.g., New York C. & H.R. R.R. v. Tonsellito*, 244 U.S. 360, 361-62 (1917). Thus, if CSX's proposed procedure had been followed, there would not have been two recoveries to integrate and no risk of too much or too little recovery.

[24] Petitioners underestimate the frequency with which the trials of complex cases are bifurcated. *See, e.g., In re Innotron Diagnostics*, 800 F.2d 1077, 1084 (Fed. Cir. 1986) (describing the "now-standard practice" of bifurcating patent issues and antitrust issues in cases involving both).

in matters of this type. *See* pages 15-16 *supra*.

Petitioners claim that the Court of Appeals' decision is unique in holding a denial of a motion to bifurcate to be an abuse of discretion, but they define the issue too narrowly in making that assertion. Courts of appeals have on a number of occasions found that district courts abused their discretion in consolidating claims or issues for trial, *e.g.*, *Arnold v. Eastern Air Lines, Inc*, 712 F.2d at 906-07; *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 196-97 (5th Cir. 1966), *cert. denied*, 386 U.S. 958 (1967), and in severing claims or issues for trial, *e.g.*, *C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas*, 411 F.2d 1379, 1388 (4th Cir. 1969); *United Air Lines, Inc. v. Wiener*, 286 F.2d 302, 306 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961). In a variety of situations they have preempted the district court's discretion by directing a district court to try a certain type of claim separately on remand. *E.g.*, *Cavanaugh v. Western Maryland*

Ry., 729 F.2d 289, 294-95 (4th Cir.), *cert. denied*, 469 U.S. 872 (1984) (directing district court to try plaintiff's FELA claim separately from railroad's state law counterclaim); *Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118, 1120 (7th Cir. 1976) (per curiam). *See also Sporia v. Pennsylvania Greyhound Lines, Inc.*, 143 F.2d 105 (3d Cir. 1944) (abuse of discretion not to sever claims under Rule 21). In each situation, the court must weigh the benefits in efficiency against the risk that one party or the other will be prejudiced.[25] Rule 42 gives the district judges discretion in weighing that balance. Contrary to Petitioners' implicit assertion, it does not immunize that ruling from appellate review.

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[25] Petitioners cite a consolidation case, *Ikerd v. Lapworth*, 435 F.2d 197 (7th Cir. 1970), in discussing when bifurcation is appropriate, Petition at 47 n.8, thus at least implicitly recognizing that consolidation and bifurcation present the same basic problems and warrant the same scope of appellate review.

In an unusually fact-specific decision in a case involving a rare configuration of evidence and claims, the Fourth Circuit correctly ruled that the District Court abused its discretion in denying CSX's motion to bifurcate and amply supported its conclusion that CSX was denied a fair trial. The decision of the Fourth Circuit is correct and does not warrant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Thomas Ashe Lockhart

Counsel of Record

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-76-Civil-568

Memorandum and Order

Dean Neil Newton and Barbara Ann Newton, individually and as husband and wife,

Plaintiffs,

vs.

Western Weighing & Inspection Bureau and Western Railroad Association, The Atchison, Topeka & Santa Fe Ry. Co., Burlington Northern, a Delaware Corporation, Chicago & Northwestern Transportation Co., a Delaware Corporation, Duluth, Missabe & Iron Range Ry. Co., The Milwaukee Motor Transportation Company a/k/a The Milwaukee Road, a Wisconsin Corporation, Soo Line R.R. Co., a Minnesota Corporation, and Toledo, Peoria & Western R.R. Co.,

Defendants.

HARRY A. SIEBEN, JR., Minneapolis, Minnesota, attorney for plaintiffs.

PATRICK J. McPARTLAND, Minneapolis, Minnesota, attorney for defendant Soo Line Railroad Company.

ROGER R. ROE, JR., Minneapolis, Minnesota, attorney for defendants Milwaukee Motor Transportation Co., Western Weighing & Inspection Bureau and Western Railroad Association.

WILLIAM M. BURNS, Duluth, Minnesota, attorney for defendant Duluth, Missabe & Iron Range Railway Co..

EDWARD M. GLENNON, Minneapolis, Minnesota, attorney for defendants Atchison, Topeka and Santa Fe Railway Co., Chicago and Northwestern Transportation Co. and Peoria & Western Railroad Co.

RICHARD V. WICKA, St. Paul, Minnesota, attorney for defendant Burlington Northern.

Plaintiff instituted this lawsuit under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., alleging that defendants are liable for injuries he suffered in an industrial accident. Plaintiff, an

employee of defendant Western Weighing and Inspection Bureau (W.W.I.B.), a division of defendant Western Railroad Association (W.R.A.), was injured as he was installing grain doors in a Burlington Northern box car on tracks near the Republic grain elevator in Minneapolis. Installation of grain doors, a process known as "coopering," is required on all boxcars in which grain is shipped and is a service performed by W.W.I.B. employees for defendant railroads. The W.R.A. is an unincorporated service association headquartered in Chicago and controlled by a number of railroads.

All defendants have filed motions for summary judgment which, for the purposes of discussion, may be broken down into two groups: those brought by the railroads and Milwaukee Motor Transport and those brought by W.W.I.B. and W.R.A. Defendants

have filed legal memoranda and affidavits in support of these motions and plaintiff has submitted a brief and an affidavit of his attorney in opposition to them. Based on the pleadings, the answers to interrogatories and affidavits on file, defendant's motions are granted.

The Federal Employers' Liability Act provides that [e]very common carrier by railroad ". . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . ." W.W.I.B. and W.R.A. contend that neither is a "common carrier by railroad" and the rest of the defendants contend that plaintiff was not in their employ at the time of the accident. Plaintiff counters by arguing that W.W.I.B. and W.R.A. are merely agents of the railroads and that, therefore, all defendants are subject to suit under F.E.L.A. and that, in all events, the questions

of whether he was an employee of the railroads or whether W.W.I.B. and W.R.A. are common carriers by rail are fact questions which a jury must resolve.

Turning first to those motions brought by the railroads and Milwaukee Motor Transport, it is clear that they must be granted because the uncontroverted facts contained in defendants' affidavits clearly demonstrate that plaintiff was not in their employ at the time of the accident. It is true, as plaintiff asserts, that whether he is an employee of the railroads is a fact question. Baker v. Texas & P. Ry., 359 U.S. 227, 229 (1959). It is, perhaps more appropriate to say that this is really a conclusion which may be drawn from a number of facts, primarily whether the putative employer exercised control or had the right to exercise control over the details of plaintiff's job. Kelley v. Southern

Pacific Co., 419 U.S. 318, 326 (1974). The affidavits on file indicate that the railroad defendants and Milwaukee Motor Transport did not exercise control over and did not have the right to exercise control over the details of plaintiff's job.

In his memorandum of law submitted in opposition to these motions, plaintiff concludes that it "strains credulity to suggest that positively no one of the member railroads has the authority to direct the operation of one of the divisions of its own service organization." However, the affidavit of his attorney submitted in opposition to these motions does not contain facts which support this conclusion or controvert the factual contentions established by defendants' affidavits. It is of course an elementary principle of law that a party may not rest on allegations contained in the pleadings to resist

summary judgment motions supported by affidavits. Lyons v. Board of Education of Charleston, 523 F.2d 340 (8th Cir. 1975), Langeslag, et al. v. St. Paul Union Depot Co., et al., 3-75-Civ-60 (D. Minn. March 10, 1976). Consequently summary judgment in favor of the railroads and Milwaukee Motor Transport is appropriate.

Because neither is a "common carrier by railroad" as required by F.E.L.A., the motions of the W.W.I.B. and W.R.A. must also be granted. In Wells Fargo & Co. v. Taylor, 254 U.S. 175, 187 (1919), the court indicated that "the words 'common carrier by railroad' as used in the Act, mean one who operates a railroad as a means of carrying for the public - that is to say, a railroad company acting as a common carrier." Information contained in answers to Interrogatories, uncontroverted by

plaintiff, indicates that W.W.I.B. is a division of W.R.A. which is "an independent contractor engaged by various line haul carriers located west of the Mississippi River to perform various services." Uncontroverted information contained in the affidavits indicates that W.W.I.B. "owned no rolling stock, locomotive engins or the like and, further W.W.I.B. did not hold itself out as available to carry either persons or freight for hire."

In conclusion, the established facts clearly demonstrate that defendants W.W.I.B. and W.R.A. are not common carriers by railroad and that plaintiff was not an employee or subservant of any of the other defendants. Because there are no material facts in dispute and defendants are entitled to judgment as a matter of law, their motions for summary judgment are granted.

The seeming harshness of this result is mitigated by the fact that it does not leave plaintiff remediless. The court's ruling only means that plaintiff may not proceed in federal court under the F.E.L.A. If he has a meritorious claim he may proceed against the proper parties with a negligence lawsuit brought under state law.

IT IS ORDERED that defendants' motions for summary judgment are GRANTED. The clerk is directed to enter judgment.

Dated: May 13, 1977.

EDWARD J. DEVITT,
Chief Judge
United States District Court